TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 556

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, A MUNICIPAL CORPORATION, ET AL., PETITIONERS,

vs.

EVELYN SEBER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 30, 1942.

CERTIORARI GRANTED JANUARY 11, 1943.

SUPREME COURT OF THE UNITED STATES

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[fol. a] [Caption omitted]

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 2488

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, State of Oklahoma, a Municipal Corporation et al., Appellants,

vs.

EVELYN SEBER et al., Appellees.

STATEMENTS OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL—Filed January 23, 1942

Come now the appellants herein and, pursuant to Rule 13 of the Revised Rules of the United States Circuit Court of Appeals, Tenth Circuit, state that the points on which they intend to rely on appeal in the above case are as follows:

(1)

That this court has no jurisdiction of the parties in this action for the reason that there is no diversity of citizenship.

(2)

That the Complaint does not state facts sufficient to constitute a valid cause of action at law or in equity against the appellants herein or either of them.

(3)

That it appears on the face of said Complaint that the ground of federal jurisdiction relied on therein is that a federal question is involved, but said Complaint clearly shows that in fact there is no such question actually involved and, therefore, this court is without jurisdiction.

[fol. 2] (4)

That the complaint shows on its face that if a cause of action ever accrued wherein said taxes were wrongfully collected by the County Treasurer of Creek County, Oklahoma,

that said action could and should have been maintained by said appellees by paying said taxes under protest and bringing suit within the time prescribed by statute, or filing an affidavit of erroneous assessment with the Board of Equalization of Creek County, Oklahoma, as prescribed by statute, or that said action could have been maintained at any time within three years after the payment of said taxes, which time expired some time before the bringing of this action.

(5)

That the Federal Act of June 20, 1936, passed by the 74th Congress, the same being reported in 49 United States Statutes at Large, and the Federal Act passed by Congress on May 19, 1937, the same being reported in 50 Statutes at Large 188, amending Section 2 of the 1936 Act, supra, under which the appellees assert their rights to recover said taxes and prevent said land from being placed upon the tax rolls of Creek County and the same assessed as other lands therein located belonging to citizens of the State of Oklahoma, are unconstitutional, void and of no force and effect.

(6)

That said Act of Congress enacted on June 20, 1936, and the Act of May 19, 1937, amending said former act, relied upon by the appellees herein to support their cause of action against these appellants, even though declared constitutional, have no application to the lands involved in this cause of action.

(7)

That paragraphs numbered 1, 2, 3, 4, 5 and 6 of the court's conclusions of law are not supported by the evidence and are contrary to law.

[fol. 3]

(8)

The judgment of the court is (a) contrary to the evidence, (b) to the law, and (c) to the law and evidence.

Mac Q. Williamson, Attorney General of the State of Oklahoma, by Houston Bus Hill, Assistant Attorney General of the State of Oklahoma; Everett Collins, County Attorney, Creek County, Oklahoma; Kenneth Hughes, Assistant County Attorney, Creek County, Oklahoma, Attorneys for Appellants.

Affidavit of Mailing

STATE OF OKLAHOMA,
Oklahoma County, ss.:

Effa Alexander, being duly sworn upon oath, deposes and says that on the 21st day of January, 1942, she enclosed a copy of the attached Statements of Points on Which Appellants Intend to Rely on Appeal in an envelope addressed to: Mr. George Jennings, Attorney at Law, Sapulpa, Oklahoma, with postage thereon fully prepaid, and deposited the same in the United States post office at the State Capitol, in Oklahoma City, Oklahoma.

Effa Alexander.

Subscribed and sworn to before me this 19th day of January, 1942. Jean Brawner, Notary Public. My commission expires October 27, 1945. (Seal.)

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

DESIGNATION OF PARTS OF THE RECORD PROCEEDINGS AND EVIDENCE TO BE INCLUDED IN THE RECORD ON APPEAL—Filed January 23, 1942

The Clerk will cause to be printed for the consideration of the Court in deciding this case the following portions of the record:

(1) Plaintiff's Bill of Complaint, including exhibits;
[fol. 4] (2) Order Authorizing Amendment of Complaint, entered on November 4, 1940;
(3) Defendant's motion to dismiss bill of complaint;
(4) Order overruling defendant's motion to dismiss;
(5) Joint motion for substitution of party, filed herein on May 26, 1941;
(6) Waiver of Notice of hearing motion for substitution filed herein on May 26, 1941;
(7) Order allowing substitution of party;
(8) Defendant's Answer;
(9) Agreed Statement of Facts;
(10) Findings of Fact and Conclusions of law, filed herein by the court on July 21, 1941;
(11) Decree filed herein on July 21, 1941;

(12) Defendant's Notice of Appeal, filed herein on October 15, 1941;

(13) Order Extending Time within which to lodge appeal in the Tenth Circuit Court of Appeals entered herein on November 29, 1941;

(14) Application to Substitute Successor in Office, party defendant;

(15) Order substituting W. Howard Seay, as County Assessor of Creek County, as defendant in the above cause in lieu of J. Clyde Staiger, predecessor in office, entered herein on December 20, 1941;

(16) Order Extending Time within which to lodge appeal to the Tenth Circuit Court of Appeals, entered herein on December 30, 1941;

(17) Petition to vacate order substituting party, filed herein by defendants;

(18) Order overruling petition to vacate order substituting party, entered on January 5, 1942;

(19) Cost bond filed herein;

[fol. 5] (20) Statement of points on which appellants intend to rely on appeal, with proof of service; and,

(21) Designation of Parts of the record proceedings and evidence to be included in the record on appeal, with proof of service.

Mac Q. Williamson, Attorney General of the State of Oklahoma; Houston Bus Hill, Assistant Attorney General; Everett Collins, County Attorney, Creek County, Oklahoma; Kenneth Hughes, Assistant County Attorney, Creek County, Oklahoma, Attorneys for Appellants.

AFFIDAVIT OF MAILING

STATE OF OKLAHOMA,
Oklahoma County, ss:

LeRose Welch, being duly sworn upon oath, deposes and says that on the 21st day of January, 1942, she enclosed a copy of the attached Designation of Parts of the Record Proceedings and Evidence to be Included in the Record on Appeal in an envelope addressed to: Mr. George Jennings, Attorney at Law, Sapulpa, Oklahoma, with postage thereon

fully prepaid, and deposited the same in the United States post office at the State Capitol, in Oklahoma City, Oklahoma.

LeRose Welch.

Subscribed and sworn to before me this 21st day of January, 1942. Effa Alexander, Notary Public. My commission expires October 28, 1944. (Seal.)

[fol. 6] IN DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 436. Civil

EVELYN SEBER, Otherwise Known as OSHARSHA JOHN, Jimmie Powshiek and Juanita Deere, now McIntosh, Plaintiffs,

vs.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, a Municipal Corporation, H. L. Payne, County Treasurer of the County of Creek, State of Oklahoma; W. Howard Seay, County Assessor of the County of Creek, State of Oklahoma, and W. B. Key, County Clerk, County of Creek, State of Oklahoma, Defendants

COMPLAINT—Filed July 26, 1940

Come now the plaintiffs, and for cause of action or claim against the defendants above named, allege and aver:

First Cause of Action

I

That the plaintiffs are residents and citizens of the County of Creek, State of Oklahoma, and are domiciled within the Northern Judicial District of the State of Oklahoma, and are unenrolled full-blood members of the Creek or Muskogee Tribe of Indians; that this action arises under the Statutes of the United States of America, namely: the Act of Congress of June 22, 1936 (49 Stat. 1542), and the [fol. 7] Act of Congress of May 19, 1937 (50 Stat. 188), as hereinafter more fully appears. The matter in controversy

exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

II

That the defendant, Board of County Commissioners of the County of Creek, State of Oklahoma, is a municipal corporation, organized and existing as such under and by virtue of the laws of the State of Oklahoma; that the defendant, H. L. Payne, is duly qualified and acting County Treasurer of the County of Creek, State of Oklahoma, and the defendant, J. Clyde Staiger, is the duly qualified and acting County Assessor of Creek County, Oklahoma, and the defendant, W. B. Key, is the duly qualified and acting County Clerk of said County.

III

That Wosey John, now Deere, deceased, was the mother of these plaintiffs, and was a full-blood member of the Creek or Muskogee Tribe of Indians, duly enrolled as such opposite Roll Number 9546 of the Approved Rolls of such Tribe; that during the times hereinafter mentioned the Secretary of the Interior of the United States held in his custody a large amount of restricted Indian money belonging to her, the said Wosey John, now Deere, which funds had so accumulated to her credit from the sale of oil and gas from restricted Indian lands belonging to her, the said Wosey John, now Deere.

IV

That on or about the 11th day of December, 1915, one Martin Walder, joined by Irene Walder, his wife, in consideration of the payment of the sum of Seven-thousand-five-hundred dollars ($7,500.00) from the restricted Indian funds, aforesaid, made, executed and delivered to the Secretary of the Interior of the United States his certain deed, in writing, conveying to said Wosey John, her heirs and assigns, the following described real estate and premises, situate in Creek County, Oklahoma, to-wit:

The center Fifty (50) feet of Lot Six (6), and the Center [fol. 8] Fifty (50) feet of the South Thirty-three and 41/100 (33.41) feet of Lot Three (3), in Block Thirty-nine (39) of the Original Townsite of the City of Sapulpa.

That by the terms of said deed the said Wosey John, and her heirs were restricted from alienating and encumbering said premises without consent and approval of the Secretary of the Interior, until the 26th day of April, 1931. A true and correct copy of said deed of conveyance is attached, as Exhibit A and made a part of this complaint, as though herein set forth pro-forma.

V

That on the 24th day of March, 1920, one Alice Hughes, in consideration of the sum of Seven-thousand-five hundred dollars ($7,500.00) from the restricted Indian funds aforesaid, made, executed and delivered to the Secretary of the Interior her certain deed, in writing, conveying to the said Wosey John, her heirs and assigns, the following described premises, situate in Creek County, Oklahoma, to-wit:

The West Half (W2) of the Northwest Quarter (NW4) of the Southwest Quarter (SW4) of the Southwest Quarter (SW4), and the West Half (W2) of the South Half (S2) of the Southwest Quarter (SW4) of the Southwest Quarter (SW4) of Section Thirty-six (36), Township Eighteen (18) North, Range Eleven (11) East;

That by the terms of said deed the said Wosey John, and her heirs, were restricted from alienating or encumbering said premises, without the consent and approval of the Secretary of the Interior of the United States, until the 26th day of April, 1931. A true and correct copy of said deed of conveyance is attached hereto, as Exhibit B, and made a part of this complaint as though herein set forth pro-forma.

VI

That on the 8th day of November, 1927, the American National Bank of Sapulpa, Oklahoma, a corporation, in consideration of the payment of the sum of Ten-thousand dollars ($10,000.00) from the restricted Indian funds, aforesaid, made, executed and delivery to the Secretary of the Interior of the United States its certain deed, in writing, [fol. 9] conveying to the said Wosey John, her heirs and assigns, the following described premises situate in Creek County, Oklahoma, to-wit:

The West Half (W2) of the Southwest Quarter (SW4) of Section Twenty-seven (27), Township Eighteen (18), North, Range Eleven (11) East;

That by the terms of said deed the said Wosey John and her heirs were restricted from alienating or encumbering said premises, without the consent and approval of the Secretary of the Interior of the United States until the 26th day of April, 1931. A true and correct copy of said deed of conveyance is hereto attached, as Exhibit C, and made a part of this complaint, as though herein set forth pro-forma.

VII

That after the purchase of said lands above described the Secretary of the Interior expended large sums from the restricted Indian funds of the said Wosey Deere, aforesaid, in the erection and construction of permanent and lasting improvements upon the aforementioned and described lands and premises.

VIII

That on or about the 4th day of March, 1931, the said Wosey John, now Deere, made, executed and delivered to these plaintiffs her certain deed, in writing, thereby jointly conveying to these plaintiffs the tracts and parcels of land aforesaid, reserving, however, to the said grantor a life estate in each of such parcels and tracts of land; that said deed was duly submitted to and approved by the Honorable Secretary of the Interior of the United States.

That by the terms and conditions of said deed these plaintiffs and their heirs were forever restrained from alienating or encumbering said premises, or any part thereof, without the consent and approval of the Secretary of the Interior of the United States. A true and correct copy of said deed, with the endorsement of approval thereon is attached hereto as Exhibit D and made a part of this complaint, as though herein set forth pro-forma.

[fol. 10] IX

That thereafter, and on the 10th day of December, 1937, the said Wosey John, now Deere, made, executed and delivered to these plaintiffs her certain deed, in writing, conveying to these plaintiffs all of the right, title and interest of the said Wosey John in and to the parcels and tracts

of land aforesaid. That by the terms of such deed the plaintiffs herein and their heirs were forever restrained from alienating and encumbering said premises, or any part thereof, without the consent and approval of the Secretary of the Interior of the United States. A true and correct copy of said deed of conveyance is attached hereto, as Exhibit E, and made a part of this complaint as though herein set forth pro-forma.

X

That thereafter, and on December 16, 1937, these plaintiffs, with the consent and approval of the Secretary of the Interior, selected the parcels and tracts of land so located in Section 27 and 36 above described, as tax exempt, and a certificate of tax exemptions was duly executed and filed in the office of the County Clerk of Creek County, Oklahoma, in accordance with the provisions of Section 2 of the Act of Congress of June 30, 1936 (49 Stat. 1542) as amended by Act of Congress of May 19, 1937 (59 Stat. 188). A true and correct copy of said Certificate of Tax Exemptions is attached hereto as Exhibit F and made a part of this complaint, as though herein set forth pro-forma.

XI

Plaintiffs allege that each of the tracts and parcels of land aforesaid were Federal instrumentalities and were not subject to taxation by the County of Creek, State of Oklahoma, and its municipal sub-divisions for the tax years 1936 and 1937, by reason of the provisions of Section 2 of the Act of Congress of June 20, 1936 (49 Stat. 1542); but that notwithstanding such fact the County Assessor of said County wrongfully assessed each of such tracts for advalorem tax purposes, and caused taxes to be levied and assessed against the same for each of said years and caused such taxes to [fol. 11] be extended upon the tax rolls of said County against such respective tracts and parcels of land.

That the property so located in Block Thirty-nine (39) of the City of Sapulpa, aforesaid, was assessed for each of said years at the valuation of Twelve thousand dollars ($12,000.00) and advalorem taxes were levied against the same, and extended upon the tax rolls of said County as charges against said land, in the following amounts: For the year 1936 the sum of Eight-hundred-twenty-nine and

61/100 dollars ($829.61). For the year 1937 the sum of Nine-hundred-seventeen and 04/100 dollars ($917.04).

That the property so located in Section 36, aforesaid, was assessed for each of said years at the valuation of Two-thousand-eight-hundred dollars ($2,800.00), and advalorem taxes were levied against the same and extended upon the tax rolls of said County as charges against said land in the following amounts: For the year 1936 the sum of One-hundred-thirty-six and 87/100 dollars ($136.87); for the year 1937 the sum of One-hundred-sixty-four and 04/100 dollars ($164.04).

That the property so located in Section 27, aforesaid, was assessed for each of said years at the valuation of Seventeen-thousand-four-hundred dollars ($17,400.00), and advalorem taxes were levied against the same and extended upon the tax rolls of said County as charges against said land in the following amounts: For the year 1936 the sum of Eight-hundred-forty-eight and 80/100 dollars ($848.80); for the year 1937 the sum of Nine-hundred-ninety-three and 97/100 dollars ($993.97).

XII

That plaintiffs have at all times since the year 1931 occupied the premises so located in Section 27, aforesaid, as their home and homestead, and that such lands were not subject to taxation by the County of Creek, State of Oklahoma, and its municipal sub-divisions during the tax years 1938 and 1939, and such lands are not now, and will not in the future be subject to taxation by said County and its municipalities so long as the same is the home and house-
[fol. 12] stead of these plaintiffs, or either of these plaintiffs, or either of them, or their heirs; and so long as the plaintiffs or their heirs are restrained from alienating or encumbering the same by reason of the provisions of the Act of Congress of May 10, 1937 (50 Stat. 188), but that notwithstanding such fact the County Assessor of said County, defendant herein, wrongfully assessed said land for advalorem tax purposes for each of the years 1938 and 1939 at the valuation of Seventeen-thousand-four-hundred dollars ($17,400.00), and caused advalorem taxes to be levied against the same and caused such taxes to be extended upon the tax rolls of said County as charges against said land; that the taxes so levied against said land, and so extended

upon the tax rolls of said County for said years, are as follows: For the year 1938; the sum of Eight-hundred-ninety-three and 57/100 dollars ($893.57) for the year 1939 the sum of Nine-hundred-ninety-four and 86/100 dollars ($994.86).

XIII

That the defendants herein, by reason of the levy and assessment of said illegal and void taxes, aforesaid, asserted and claimed a lien upon said lands for the respective amounts so levied against the same for each of the years, aforesaid, with penalties thereon, at the rate of twelve per cent (12%) per annum, and the defendants threaten to cause said lands to be sold for the purpose of enforcing the collection of such illegal and void taxes, and that these plaintiffs, in order to quiet the title to their said land against said illegal and void tax lien and to avoid the accumulation of penalties and the sale of their said lands under compulsion, duly paid to the County Treasurer of Creek County, Oklahoma, defendant herein, the sum of One-thousand-six-hundred-seventy-eight and 41/100 dollars ($1,678.41) on December 15, 1936, which said amount was paid and received by the defendants in satisfaction of the illegal and void taxes assessed against the property so located in Block Thirty-nine (39) in the City of Sapulpa, and so located in Section Twenty-seven (27), aforesaid, for the *years* 1936, and that plaintiffs did, under compulsion, and duress, pay to the said County Treasurer, defendant herein, on November 14, 1939, the sum of Three-thousand-one-hundred-five and 59/100 dollars ($3,105.59), which [fol. 13] amount was paid and received by the defendant in satisfaction of the illegal and void taxes levied against the property so located in Block Thirty-nine (39) of the City of Sapulpa, aforesaid, for the year 1937, and in payment of taxes so wrongfully assessed against the property so located in Section Thirty-six (36) aforesaid, for the years 1936, 1937 and 1938, and in payment of the taxes so wrongfully assessed against the property located in Section Twenty-seven (27), aforesaid, for the years 1937-1938.

XIV

Plaintiffs further say that the taxes which have so wrongfully been levied against the West Half (W2) of the Southwest Quarter (SW4) of Section Twenty-seven (27), Town-

ship Eighteen (18) North, Range Eleven (11) East, for the year 1939, remains wholly unpaid, and that the same are illegal and void for the reasons aforesaid, but that notwithstanding such fact the defendants claim and assert that such taxes with penalties thereon are and constitute a lien upon said premises, and defendants will, unless restrained and enjoined by the judgment of this Honorable Court, continue to assert and claim a lien upon said premises for the amount of such illegal and void tax, with penalties thereon, and defendants will, unless restrained and enjoined from so doing, offer for sale and sell said lands for the purpose of enforcing the collection of said illegal and void tax claim.

XV

That the defendant, J. Clyde Staiger, as County Assessor, of said County, and the defendant, W. B. Key, as County Clerk of said County, are enjoined with the duty of preparing the tax rolls of said County; that the defendant, County Assessor has wrongfully listed the lands last above described, namely: The West Half (W2) of the Southwest Quarter (SW4) of Section Twenty-seven (27), Township Eighteen (18) North, Range Eleven (11) East, for ad valorem taxes for the year 1940, at the valuation of Seventeen-thousand-four-hundred dollars, ($17,400) and that said defendants, County Clerk and County Assessor, will, unless restrained and enjoined by the judgment of this Honorable Court extend such property upon the assessment list and [fol. 14] tax rolls of said County for the year 1940, and for subsequent years.

XVI

That the defendant, H. L. Payne, as County Treasurer of said County, is enjoined with the duty of collecting all advalorem taxes due to said County and its municipalities, and is now asserting and claiming a lien upon the lands last above described for the amount of the illegal and void taxes so assessed against the same for the year 1939, with penalties thereon, and will, unless restrained, continue to claim and assert a lien upon said lands for such illegal and void taxes and penalties, and that said defendant will, if permitted, claim and assert a lien upon said lands for such illegal and void taxes as may be levied against the same for the year 1940, and subsequent years, and will, unless restrained, offer said lands for sale for the purpose of enforc-

ing the collection of such illegal and void taxes which may be so levied against the same for the year 1940, and subsequent years.

Wherefore, plaintiffs pray for judgment against the defendant, Board of County Commissioners of the County of Creek, State of Oklahoma, for the sum of One-thousand-six-hundred-seventy-eight and 41/100 dollars ($1,678.41), with interest at the rate of six percent per annum from the 15th day of December, 1936, and for judgment against the defendant, Board of County Commissioners of the County of Creek, State of Oklahoma, for the sum of Three-thousand-one-hundred-five and 59/100 dollars ($3,105.59), with interest at the rate of six percent per annum from the 14th day of November, 1939, and plaintiffs further pray for a declaratory judgment adjudging and decreeing the lands described as the West Half (W2) of the Southwest Quarter (SW4) of Section Twenty-seven (27), Township Eighteen (18) North, Range Eleven (11) East, to be non-taxable in the County of Creek, State of Oklahoma, for the years 1939 and 1940, and decreeing the same to be non-taxable by said County and its municipalities so long as such lands shall remain the home and homestead of these plaintiffs, or either of them, or their heirs, and so long as the plaintiffs or their heirs are restrained from alienating or encumbering the same; that the taxes so assessed against said land for the year 1939, [fol. 15] and so extended upon the tax rolls of said County be decreed to be illegal and void, and that the same be cancelled and annulled; that the defendant, County Treasurer, and his successors in office, be restrained and enjoined from taking any steps for the enforcement of the collection of such illegal and void taxes; that the defendants, County Assessor and County Clerk, and their successors in office be enjoined and restrained from extending such lands upon the assessment list of said County, and from levying any taxes against the same for the year 1940, and so long thereafter as such land shall remain the homestead of these plaintiffs, or either of them, or their heirs, and so long as the plaintiffs, or their heirs, are restrained from alienating or encumbering the same, and for all other relief, legal and equitable, to which plaintiffs may be entitled in the premises, including the costs of this action.

George Jennings, Attorney for Plaintiffs, Sapulpa, Oklahoma.

[File endorsement omitted.]

EXHIBIT "A" TO COMPLAINT

22583.

Warranty Deed—Special Form.

This Indenture, made, executed and delivered this 11th day of December, 1915, by and between Martin Walter and Alene Walter, husband and wife, parties of the first part, grantors, and Wosey John, party of the second part, grantee, Witnesseth:

That for and in consideration of the sum of Seven Thousand Five Hundred and no/100 dollars ($7500.00) to them in hand paid, the receipt whereof is hereby acknowledged, from Wosey John, the Same Being Funds Held by the United States in Trust, Subject to Disbursement Under the Supervision of the Secretary of the Interior, have granted, bargained, sold and conveyed unto the said Wosey John, [fol. 16] grantee, and by these presents do hereby grant, bargain, sell and convey unto the said Wosey John, grantee, the following described real property and premises situated in Creek County, State of Oklahoma, to-wit:

Part of Lots Three (3), and Six (6), in Block Thirty-nine (39) in the City of Sapulpa, Oklahoma, more particularly described as follows: Beginning at a point on the South boundary line of Lot Six (6) Fifty (50) feet West from the Southeast corner of said Lot Six (6); thence North One Hundred and Forty (140) feet along a line parallel with the West boundary of Lots Three (3) and Six (6); thence West Fifty (50) feet along a line parallel with the South line of Lot Six (6); thence South One Hundred and *Forth* feet along a line parallel with the West boundary of Lots Three (3) and Six (6) to the South boundary of said Lot Six (6); thence East Fifty (50) feet to the place of beginning; being in area Fifty (50) feet to the place of beginning, being in area Fifty (50) x One Hundred (100) feet, together with all the improvements thereon, and appurtenances thereunto belonging, and warrant the title to the same.

To Have and to Hold said described premises, unto the said grantee, her heirs and assigns, forever, free and clear and discharged of all former grants, charges, taxes, judgments, mortgages, and other liens and incumbrances of

whatsoever nature, subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described, or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification, Unless Made with the Consent of and Approved by the Secretary of the Interior.

Signed and delivered on the day and date first above named.

Martin Walter, Alene Walter.

(Revenue sta.. os for $7.50 attached and cancelled.)

[fol. 17] *Acknowledgement*

The State of Oklahoma,
Creek County, ss.:

Before me, Grace Lindsey, in and for said County and State on this 4th day of December, 1915, personally appeared Martin Walter and Alene Walter, husband and wife, to me known to be the identical person who executed the within and foregoing instrument, the said Martin and Alene Walter having executed same in my presence and in the presence of as witnesses, and both of said grantors acknowledged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and official seal, the day and year above set forth.

[SEAL] Grace Lindsey, Notary Public.

My commission expires February 2, 1919.

Certificate of Notice.

Department of the Interior. United States Indian Service.
Five Civilized Tribes, Muskogee, Oklahoma.

December 11, 1915.

I hereby certify that the land described in the above deed was purchased for the said Wosey John with funds Held in Trust by the United States for her benefit from funds derived from oil royalties for restricted land, inherited by the said Wosey John, by virtue of her enrollment as a full

blood citizen of the Creek Nation, opposite No. 9546 on the final approved rolls of citizens by blood of that Nation, and that said purchase was made and said deed was executed, and the same is hereby approved pursuant to the Regulations prescribed by the Secretary of the Interior under the Act of Congress approved May 27, 1908, and the Act approved August 1, 1914.

Joe H. Strain, Acting Superintendent for the Five Civilized Tribes.

[fol. 18] STATE OF OKLAHOMA,
County of Creek:

This instrument was filed in my office for record on December 13, 1915, at 2 o'clock P. M., and duly recorded in book 118 at page 410.

Gus L. Corey, County Clerk, by C. W. Maddox, Deputy.

EXHIBIT "B" TO COMPLAINT

71585.

Warranty Deed.

This Indenture, made, executed and delivered this 24th day of March, 1920, by and between Alice Hughes, a single woman, party of the first part, grantor, and Wosey Powesheik, nee John, party of the second part, grantee, Witnesseth:

That for and in consideration of the sum of Seven Thousand Five Hundred and no/100 dollars ($7,500.00) to her in hand paid, the receipt whereof is hereby acknowledged, from Wosey Powesheik, nee John.

The Same Being Funds Held by the United States in Trust, Subject to Disbursement Under the Supervision of the Secretary of the Interior, derived from oil royalties from restricted land allotted to said Wosey Powesheik, nee John, have granted, bargained, sold and conveyed unto the said Wosey Powesheik, nee John, grantee, and by these presents, do hereby grant, bargain, sell and convey unto the said Wosey Powesheik, nee John, grantee, the following described real property and premises situated in Creek County, State of Oklahoma, to-wit:

The West half (W/2) of the Northwest Quarter (NW/4) of the South West Quarter (SW/4) of the Southwest Quarter (SW/4) and the West Half (W/2) of the East Half (E/2) of the Northwest Quarter (NW/4) of the Southwest Quarter (SW/4) of the South West Quarter (SW/4) of Section Thirty-six (36), Township Eighteen (18) North, Range Eleven (11) East, containing Seven and Fifty/100 (7.50) [fol. 19] acres, more or less according to the Government survey thereof.

together with all the improvements thereon, and appurtenances thereunto belonging, and warrant the title to the same.

To Have and to Hold, said described premises, unto the said grantee, her heirs and assigns, forever, free and clear and discharged of all former grants, charges, taxes, judgments, mortgages, and other liens and incumbrances of whatsoever nature, subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell or other instrument affecting the land herein described or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification, Unless Made With the Consent or Approved by the Secretary of the Interior.

Signed and delivered on the day and date first above mentioned.

Alice Hughes.

Witnesses: —— ——; —— ——.

Revenue $4.50 attached and cancelled.

Acknowledgment

STATE OF OKLAHOMA,
Creek County, ss:

Before me, a Notary Public in and for said County and State, on this 24th day of March, 1920, personally appeared Alice Hughes, a single woman, to me known to be the identical person who executed the within and foregoing instrument, and said grantor acknowledged to me that she executed the same as her free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and official seal the day and year above set forth.

N. D. Menifee, Notary Public.

My commission expires March 11, 1921. (Seal.)

[fol. 20] Certificate of Notice

Department of the Interior, United States Indian Service

Five Civilized Tribes, Muskogee, Oklahoma

March 24, 1920 19—.

I hereby certify that the land described in the above deed was purchased for the said Wosey Powesheik, nee John, with funds Held in Trust, by the United States, for her benefit derived from oil royalties from restricted land allotted to said Wosey Powesheik, nee John, by virtue of her enrollment as a full blood citizen of the Creek Nation, opposite No. 9546 on the final approved rolls of the citizens by blood of that Nation, and that said purchase was made and said deed was executed, and the same is hereby approved pursuant to the regulations prescribed by the Secretary of the Interior under the Act of Congress approved May 27, 1908, and the Act approved August 1, 1914.

Gabe E. Parker, Superintendent for the Five Civilized Tribes.

State of Oklahoma, County of Creek.

This instrument was filed in my office for record on March 24, 1920, 5 o'clock P. M., and duly recorded in Book 181 at page 402.

C. K. Maddox, County Clerk.

Exhibit "C" to Complaint

30873

Warranty Deed—Special Form

This Indenture, Made, executed and delivered this 8th day of November, 1927, by and between The American National Bank of Sapulpa, Oklahoma, part of the first part, grantor and Wosey John Deere, party of the second part, grantee, Witnesseth:

That for and in consideration of the sum of Ten Thousand and no/100 dollars ($10,000.00) to them in hand paid, the receipt whereof is hereby acknowledged, from Wosey John Deere, the same being funds held by the United States in

[fol. 21] Trust, subject to Disbursement under the Supervision of the Secretary of Interior, The American National Bank, of Sapulpa, Oklahoma, have granted, bargained, sold and conveyed unto the said Wosey John Deere, grantee and by these presents do hereby grant, bargain, sell and convey unto the said Wosey John Deere, grantee, the following described real property and premises situated in Creek County, State of Oklahoma, to-wit:

West Half (W2) of Southwest Quarter (SW4) of Section Twenty-seven (27), Township Eighteen (18) North, Range Eleven (11) East of the Indian Base and Meridian, containing eighty acres more or less according to the government survey thereof.

together with all the improvements thereon, and appurtenances thereunto belonging, and warrant the title to the same.

To Have and to Hold said described premises, unto the said grantee, her heirs and assigns, forever, free and clear and discharged of all former grants, charges, taxes, judgments, mortgages, and other liens and incumbrances of whatsoever nature, subject to the conditions that no lease, deed, mortgage, power of attorney, contract to sell or other instrument affecting the land herein described or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification, Unless Made With the Consent of and Approved by the Secertary of the Interior.

Signed and delivered on the day and date first above mentioned.

The American National Bank, by H. C. Hughes, Vice President, (Corp. Seal.)

Attest: G. L. Berry, Cashier.

Acknowledgment of Corporation

STATE OF OKLAHOMA,
County of Creek, ss:

Before me, the undersigned, a Notary Public in and for said County and State, on this 8th day of November, 1927,

personally appeared H. C. Hughes, to me known to be the [fol. 22] identical person who subscribed the name of the maker thereof to the foregoing instrument as its Vice President and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

Roberta E. Kinnaird, Notary Public.

My commission expires 12-27-1930. (Notary Seal, Creek Co.)

Certificate of Notice

Department of the Interior

United States Indian Service, Five Civilized Tribes,

Muskogee, Oklahoma

November 8th, 1927.

I hereby certify that the land described in the above deed was purchased for a home for the said Wosey John Deere, with funds Held in Trust by the United States for her benefit derived from the sale of oil and gas royalties from her restricted allotment by virtue of her enrollment as full blood citizen of the Creek Nation, opposite No. 9546 on the final approved rolls of citizens by blood of that Nation, and that said purchase was made and said deed was executed and the same is hereby approved pursuant to the regulations prescribed by the Secretary of the Interior under the Act of Congress approved May 27, 1908, and the Act approved August 1, 1914.

A. G. McMillan, Acting Dist. Superintendent in Charge.

State of Oklahoma,
County of Creek:

This instrument was filed in my office for record on November 8, 1927, 1:45 o'clock P. M., and duly recorded in Book 355 at page 607.

Erma Morris, County Clerk, by Frances Delman, Deputy. (Seal.)

[fol. 23] EXHIBIT "D" TO COMPLAINT

1787

Warranty Deed

Department Received Apr. 6, 1931. No. 1627.

Know All Men by these Presents:

That Wosey John, now Deere, a single person, party of the first part, in consideration of the sum of one dollar and love and affection ($1.00) in hand paid, the receipt of which is hereby aeknowledged, does hereby grant, bargain, sell and convey unto Osharsha John, now Evalin Seber, Jimmie Powesheik and Juanita Deere, the legal issue of their bodies, the foll-ing described real property and premises, situate in Creek County, State of Oklahoma, to-wit:

The West Half of the Southwest Quarter of Section Twenty-seven, township eighteen (18) North, Range eleven (11) east; the W½ of NW¼ SW¼ SW¼ & W½ E½ NW¼ SW¼ SW¼ of section 36, township 18 north, range 11 east, also the center fifty (50) feet of lot six (6) and the center fifty (50) feet of the south 33.4 feet of lot three (3), all in block thirty-nine (39) of the original town of Sapulpa.

The grantor herein retaining all the rents and profits to be derived from all of the above property so long as she lives; that is, grantor retains a life estate in all of the real estate described in this deed, together with all the improvements thereon, and the appurtenances thereunto belonging, and warrant the title to the same.

To Have and to Hold said described premises, unto said grantees, their heirs and assigns, forever, free, clear and discharged of all former grants, charges, taxes, judgments, mortgages and other liens and encumbrances of whatsoever nature, subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument effecting the land herein described or the title thereto shall be of any force and effect, unless approved by the Secretary [fol. 24] of the Interior or the restrictions from said land are otherwise removed by operation of law.

Signed and delivered this 4th day of March, 1931.

Wosey John, now Deere.

Office of Indian Affairs. Received March 20, 1931—16906.

STATE OF OKLAHOMA,
Muskogee County, ss:

Before me, Edward Merrick, a Notary Public in and for said County and State on this 4th day of March, 1931, personally appeared Wosey John, now Deere, a single person to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year above set forth.

Edward Merrick, Notary Public, Muskogee County.

My commission expires March 17, 1931. (Notary Seal.)

Department of the Interior, Office of the Secretary

Washington, April 3, 1931.

The within deed is hereby approved.

Jos. M. Dixon, First Assistant Secretary.

STATE OF OKLAHOMA,
County of Creek:

This instrument was filed in my office for record on April 6, 1931, 4 o'clock P. M., and duly recorded in Book 393, page 596.

Paul Zimmerman, County Clerk, by O. E. Allen, Deputy. (Seal.)

EXHIBIT "E" TO COMPLAINT

32990

Warranty Deed

Know All Men by these Presents:

That Wosey John now Deere, a single person, party of the first part, in consideration of the sum of one dollar and [fol. 25] love and affection ($1.00) in hand paid, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey unto Osharsha John now Evalin Sebey, Jimmie Powesheik and Juanita Deere, and the legal issue of their bodies, the following described real property and

premises, situate in Creek County, State of Oklahoma, to-wit:

All of the life estate heretofore reserved in the following described property, as shown by the Warranty Deed heretofore executed on March 4, 1931, recorded in book 393, at page 596 of the County Clerk's records of Creek County, Oklahoma:

The West half of the southwest Quarter of Section twenty-seven, township eighteen (18) north, range eleven (11) east; the W½ of MW¼ SW¼ SW¼ & W½ E½ NW¼ SW¼ SW¼ of Section 36, township 18 north, range 11 east, also the center fifty (50) feet of lot six (6) and the center fifty (50) feet of the South 33.4 feet of lot Three (3), all in Block thirty-nine (39), of the original town of Sapulpa.

together with all the improvements thereon, and the appurtenances thereunto belonging, and warrant the title to the same.

To Have and to Hold said described premises unto said grantees, their heirs, and assigns, forever, free, clear, and discharged of all former grants, charges, taxes, judgments, mortgages, and other liens and encumbrances of whatsoever nature, subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto shall be of any force and effect, unless approved by the Secretary of the Interior of the restrictions from said land are otherwise removed by operation of law.

Signed and delivered this 10th day of December, 1937.

Wosey John now Deere.

[fol. 26] *Acknowledgment*

STATE OF OKLAHOMA,
Creek County, ss:

Before me, a notary public in and for said County and State, on this 10th day of December, 1937, personally appeared Wosey John now Deere, a single person to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal, the day and year above set forth. Kate Henry, Notary Public. My commission expires September 28, 1941. State of Okla. Sapulpa. (Notary Seal).

Certificate of Notice

Department of the Interior

United States Indian Service

Five Civilized Tribes

Muskogee, Oklahoma,
December 10, 1937.

I hereby certify that the land described in the above deed was purchased for Osharsha John now Evalin Seber, Jimmie Powesheik, and Juanita Deere, to be held in trust by the United States of America for their benefit, by virtue of their being full-blood Creek Indians, not enrolled, and that said purchase was made and said deed was executed and the same is hereby approved pursuant to the Act of Congress approved May 27, 1908 (35 Stat. L. 312), and the regulations prescribed thereunder by the Secretary of the Interior.

A. W. Landman, Superintendent for the Five Civilized Tribes.

Revenue Stamp .50c attached and cancelled.

STATE OF OKLAHOMA,
County of Creek:

This instrument was filed in my office for record on December 10, 1937, 1:10 o'clock P. M. and duly recorded in Book 449 page 71.

Huber Hughes, County Clerk, by Leota Wetzel, Deputy. (Seal.)

[fol. 27] EXHIBIT "F" TO COMPLAINT

Certificate

Designating Property Exempt from Taxation

Date December 16, 1937.

Place Sapulpa, Okla.

Pursuant to Section 2 of the Act of June 20, 1936 (49 Stat., 1542), as amended by the Act of May 19, 1937 (Pub-

lic 96, 75th Congress, First Session), the following designated restricted Indian lands purchased prior to May 19, 1937, out of the trust or restricted funds of Osharsha John, now Evaline Seber, Jimmie Powesheik, and Juanita Deere, a minor. An Indian of the Creek (Tribe-Band-Nation) are hereby selected and designated as a tax exempt homestead to remain non-taxable until otherwise directed by Congress.

Description

W½ SW Sec. 27, Twp. 18N, Range 11 E. & W½ NW SW SW & W½ E½ NW SW SW Sec. 36, Twp. 18 N. Range 11 E, Creek County, Okla.

Area 87½ acres (if agricultural and/or grazing lands) Cost—(if village, town *of* city property).

Osharsha John now Evaline Seber, Jimmie Powesheik, Juanita Deere, —— ——, Signature of Applicant.

A. M. Landman, Superintendent of Five Civilized Tribes, for Juanita Deere, Minor, Department of the Interior, Washington, D. C. ——— Unreadable.

Date March 24, 1938.

Approved: Oscar L. Chapman, Assistant Secretary. Sig. WW.

* To be designated by the Indian. The Superintendent to make such designation for all minors; when the Indian is [fol. 28] non compos mentis; and in those cases where the Indian fails to designate within a reasonable time.

5379.

Received December 27, 1937. Five Civilized Tribes. Office of Indian Affairs. Received December 31, 1937. 79539.

Received April 9, 1938. 6163. Supt. Five Civ. Tribes.

STATE OF OKLAHOMA,
County of Creek:

This instrument was filed in my office for record on April 12, 1938, 4 o'clock P. M. and duly recorded in Book 449, page 411.

Huber Hughes, County Clerk, by Leota Wetzel, Deputy. (Seal.)

State of Oklahoma, County of Creek, Sapulpa, Oklahoma. Filed This 2 day of August, 1940. W. B. Key, County Clerk. By J. H. Simpson, Deputy.

In United States District Court

Order Authorizing Amendment of Complaint—Filed November 4, 1940

Now, on this 4th day of November, 1940, It Is Ordered and Adjudged that the plaintiffs be permitted to amend their complaint herein by interlineation in the following manner:

By striking that portion of Paragraph 10 on page 5 of said complaint, which reads as follows:

"In accordance with the provisions of the Act of Congress of May 10, 1928 (45 Stat. L. 495)".

And by inserting in lieu thereof the following:

"In accordance with the provisions of Section 2 of the Act of Congress of June 20, 1936 (49 Stat. 1542), as amended by the Act of Congress of May 19, 1937 (50 Stat. 188)."

Royce H. Savage, District Judge.

[File endorsement omitted.]

[fol. 29] In United States District Court

Defendants' Motion to Dismiss Bill of Complaint—Filed August 20, 1940

Come now the Board of County Commissioners of the County of Creek, State of Oklahoma; H. L. Payne, County Treasurer of Creek County, Oklahoma; J. Clyde Staiger, County Assessor of Creek County, Oklahoma, and W. B. Key, County Clerk of Creek County, Oklahoma, defendants in the above styled and numbered cause, appearing specially for the purpose of this Motion, and this Motion only, and move the court to dismiss Plaintiffs' Bill of Complaint filed herein for the following reasons, to-wit:

1

That this court has no jurisdiction of the parties in this action, for the reason that there is no diversity of citizenship.

2

That the complaint does not state facts sufficient to constitute a valid cause of action at law or in equity against said defendants, Board of County Commissioners of Creek County, Oklahoma; H. L. Payne, County Treasurer, Creek County, Oklahoma; J. Clyde Staiger, County Assessor, Creek County, Oklahoma, and W. B. Key, County Clerk, Creek County, Oklahoma, or against either of them.

3

That it appears on the face of said Complaint that the ground of federal jurisdiction relied on therein is that a federal question is involved, but said complaint clearly shows that in fact there is no such question actually involved and, therefore, this court is without jurisdiction.

4

That the Complaint shows on its face that if a cause of action ever accrued wherein said taxes were wrongfully collected by the County Treasurer of Creek County, Oklahoma, that said action could and should have been maintained by said plaintiffs by paying said taxes under protest and bringing suit within the time prescribed by statute, or filing an affidavit of erroneous assessment with the [fol. 30] Board of Equalization and County Treasurer of Creek County, as prescribed by statute, or that said action could have been maintained at any time within three years after payment of said taxes, which time expired sometime before the bringing of this action.

5

That the federal acts under which the plaintiffs assert their right to recover said taxes and preventing said lands being placed upon the tax rolls of Creek County and same assessed as other lands therein located belonging to citizens of the State of Oklahoma are unconstitutional, void, and of no further force and effect.

That the Federal Acts of Congress relied upon by the plaintiffs herein to support their cause of action against these defendants, even though declared constitutional, have no application to the lands involved in this cause of action.

Wherefore, defendants pray that the whole of the Complaint be dismissed and that said defendants may be hence dismissed with their costs in their behalf incurred, and for such other and further relief as the court may deem just.

Mac Q. Williamson, Attorney General, by Houston E. Hill, Assistant Attorney General; Everett S. Collins, County Attorney, Creek County, Oklahoma; Kenneth Hughes, Assistant County Attorney, Creek County, Oklahoma, Attorneys for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO DISMISS—Filed July 21, 1941

This cause came on to be heard on the 30th day of September, 1940, upon the motion of the defendants to dismiss plaintiff's complaint; the parties appearing by their respective attorneys of record, and the court having heard [fol. 31] the argument, permitted the filing of briefs in support of opposition to such motion.

And now, on this 9th day of May, 1941, the court being fully advised in the premises, and on consideration thereof, finds that said motion should be, and the same is hereby overruled, to which order of the court the defendants, and each of them, except, and their exceptions are by the court allowed.

And for good cause shown, the defendants are granted an extension of thirty (30) days from this date within which to answer herein.

(s) F. E. Kennamer, Judge.

Order Approved and Copy Waived:

George H. Jennings, Attorney for Plaintiffs. Everett Collins, County Attorney of Creek County, Oklahoma, By: Everett S. Collins. Mac Q. Williamson, Attorney General, By: Houston Bus Hill.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

JOINT MOTION FOR SUBSTITUTION OF PARTY—Filed May 26, 1941

Comes now the plaintiffs and defendants in the above numbered and styled cause and respectfully show to the court:

That the term of office of the defendant, J. Clyde Staiger, as County Assessor of the County of Creek, State of Oklahoma, expired on the 7th day of January, 1941, and that he was succeeded in such office by one W. Howard Seay, who is now the duly elected, qualified and acting County Assessor of said County; and that the said W. Howard Seay, as County Assessor of Creek County, State of Oklahoma, should be substituted as a party defendant in the above numbered and styled cause in lieu and in the stead [fol. 32] of the defendant, J. Clyde Staiger, as such County Assessor.

Wherefore, plaintiffs and defendants jointly move the court to make and enter its order herein substituting as a party defendant herein, the said W. Howard Seay, County Assessor of Creek County, Oklahoma, in lieu and in the stead of the said J. Clyde Staiger, as such County Assessor.

George Jennings, Attorney for Plaintiffs. Everett S. Collins, County Attorney of Creek County, State of Oklahoma—Attorney for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

WAIVER OF NOTICE OF HEARING ON MOTION FOR SUBSTITUTION—Filed May 26, 1941

Comes now W. Howard Seay, the duly elected, qualified and acting County Assessor of the County of Creek, State of Oklahoma, and hereby accepts service of a copy of the above and foregoing joint motion for substitution, and agrees that an order be entered substituting him in his official capacity as a party defendant in the above numbered and styled cause, in accordance with the prayer of the foregoing motion.

W. Howard Seay, County Assessor, County of Creek, State of Oklahoma.

[File endorsement omitted.]

In United States District Court

Order Substituting Party—Filed May 26, 1941

This cause comes on to be heard on this 26th day of May, 1941, upon the joint petition of plaintiffs and defendants, for the substitution of W. Howard Seay, County Assessor of the County of Creek, State of Oklahoma, in lieu and in the stead of J. Clyde Staiger, County Assessor of said County, and upon the waiver of notice and consent of said [fol. 33] W. Howard Seay to said order of substitution, and the court being advised, finds:

That the term of office of the defendant, J. Clyde Staiger, as County Assessor of the County of Creek, State of Oklahoma, expired on the 7th day of January, 1941, and that he was succeeded in office by W. Howard Seay, who is now the duly qualified and acting County Assessor of said County.

It Is Therefore Ordered, Adjudged and Decreed that W. Howard Seay, County Assessor of the County of Creek, State of Oklahoma, be, and he is hereby substituted as a party defendant in the above numbered and styled cause in lieu and in the stead of the said J. Clyde Staiger, as such County Assessor.

(s) F. E. Kennamer, Judge.

[File endorsement omitted.]

In United States District Court

Defendants' Answer—Filed June 5, 1941

Come now the defendants in the above styled and numbered cause and still objecting to the jurisdiction of this court file this answer to the Complaint filed herein and deny each any every material allegation therein contained, except such as are hereinafter specifically admitted.

1

Defendants admit the allegations under paragraph one of the Complaint to the effect that the plaintiffs are residents and citizens of Creek County, Oklahoma, and are

domiciled within the Northern Judicial District of the State of Oklahoma, and are unenrolled full-blood members of the Creek or Muskogee Tribe of Indians; that the matter in controversy exceeds, exclusive of interest and costs, the sum of $3000.00, but defendants deny that the cause of action, if any, set forth in plaintiff's Complaint arose under the Statutes of the United States of America, [fol. 34] namely, the Act of Congress of June 22, 1936 (49 St. 1542), and in the Act of May 19, 1937 (50 St. 188).

2

Defendants admit that the allegations under paragraph two of the Complaint to the effect that the Board of County Commissioners of Creek County is a municipal corporation under the laws of the State of Oklahoma; that the defendant, H. L. Payne, is the duly qualified and acting County Treasurer of Creek County, and that the defendant, W. Howard Seay, is the duly qualified and acting County Assessor of Creek County, and that the defendant, W. B. Key, is the duly qualified and acting Clerk of Creek County, Oklahoma.

3

Defendants admit the allegations in paragraph three of the Complaint that Woosie John (now Deere, deceased) was the mother of the plaintiffs herein and was a full-blood member of the Creek or Muskogee Tribe of Indians, duly enrolled as such, opposite Roll No. 9546 of the Approved Rolls of such Tribe, but as to the remaining allegations thereof defendants are without knowledge or information to form a belief.

4

Defendants admit the allegations under paragraph four of said Complaint.

5

Defendants admit the allegations in paragraph five of the Complaint.

6

Defendants admit the allegations in paragraph six of the Complaint.

7

Defendants deny the allegations in paragraph seven of the Complaint to the effect that the Secretary of Interior expended large sums of Restricted Indian Funds belonging to Woosie *Deer* in the erection and construction of permanent and lasting improvements upon the above described lands and premises.

[fol. 35] 8

Defendants admit the allegations in paragraph eight of the Complaint.

9

Defendants admits the allegations in paragraph nine of the Complaint.

10

Defendants admit the allegations in paragraph nine of the plaintiffs herein on December 16, 1937, by and with the consent and approval of the Secretary of Interior attempted to select the parcels and tracts of land above described in Sections 27 and 36 in Creek County, as *tax exempt* property, and a purported certificate of tax exemption was duly executed and filed in the office of the County Clerk of Creek County, Oklahoma. But defendants expressly deny that said certificate of tax exemption was filed in accordance with the provisions of Section 2 of the Act of Congress of June 20, 1936 (49 St. 188). Defendants admit that Exhibit F is a true and correct copy of the original certificate of tax exemption therein described.

11

Defendants deny the allegations in paragraph 11 of the complaint to the effect that the lands therein described were federal instrumentalities and were not subject to taxation by Creek County, Oklahoma, and its municipal subdivisions for the tax years 1936 and 1937, under the provisions of Section 27 of the Act of Congress of June 20, 1936 (49 St. 1542).

Defendants admit that the county assessor of said county assessed each of said tracts of land described in plaintiff's complaint for ad valorem tax purposes and caused taxes

to be levied and assessed against the same for each of said years and caused such taxes to be extended upon the tax roll of said county against such respective tracts and parcels of lands, but deny that said county assessor wrongfully assessed such tracts of land for ad valorem tax purposes. Defendants admit the remaining allegations in paragraph eleven of said Complaint.

[fol. 36] 12

Defendants deny that the allegations in paragraph twelve of the Complaint to the effect that plaintiffs have since 1931 occupied the 80 acres located in Section 27 as their home and homestead, and further deny that such lands were not subject to taxation by Creek County and its municipal subdivisions during the tax years of 1938 and 1939.

Defendants further deny that such lands will not be subject to taxation by the said Creek County and its municipal subdivisions after 1939, so long as plaintiffs or the heirs are located upon said lands, as provided by the Act of Congress of May 19, 1937 (50 St. 188).

Defendants further deny that said county assessor of Creek County wrongfully assessed said lands for ad valorem tax purposes for the years 1938 and 1939, at the valuation of $17,400, but do admit that the taxes so levied and extended upon the rolls of said Creek County against said lands are as follows:

For the year 1938	$893.57
For the year 1939	994.86

13

Defendants admit the allegations in paragraph thirteen of the Complaint that by reason of the levy and assessment of such ad valorem taxes against said lands above described, defendants asserted and claimed a lien upon said lands for the respective amounts so levied against the same for the years aforesaid, with penalties thereon, at the rate of 12% per annum, but deny that said ad valorem taxes were illegally levied and assessed against said lands.

Defendants deny that they have threatened to cause said lands to be sold for the purpose of enforcing collection of said taxes hereinabove described; and further deny that said plaintiffs, in order to quiet title to their said lands

against said tax lien and to avoid the accumulation of penalties and the sale thereof under compulsion paid the county treasurer of Creek County, Oklahoma, the sum of $1678.41 on December 15, 1936. Defendants, however, state the facts to be that on December 15, 1936, Woosie John [fol. 37] (now Deere, deceased), mother of the plaintiffs herein, voluntarily paid taxes upon the lands described in the plaintiff's complaint and more particularly described as follows:

On the lots located in the City of Sapulpa, upon which there is a brick building, taxes paid	$ 829.61
On the 80 acres in Section 27	848.80
A refund on these taxes was made on May 12, 1937, in the amount of	121.08
Net Amount of Taxes Paid	$1557.33
On 7½ acres in Section 36, taxes paid	136.87

Defendants further state that the above taxes were not paid under protest.

Defendants admit that plaintiffs herein paid the ad valorem taxes, including penalties, upon the lands described in plaintiff's Complaint and more particularly hereinafter described for the years hereinafter set forth:

1937 Taxes on:

The lots in the City of Sapulpa, upon which is located a brick building	$ 917.04
The 80 acres in Section 27	993.97
The 7½ acres in Section 36	164.04
Total Taxes Paid, Including Penalties	$2075.05

1938 Taxes on:

The 80 acres in Section 27, taxes paid	$ 789.67
The 7½ acres in Section 36, taxes paid	143.80
Total Taxes, Including Penalties	$ 933.47

Defendants deny that plaintiffs paid said taxes under compulsion and duress, and further deny that said payment was made for taxes illegally levied and assessed against the

properties above described, and defendants further deny that said taxes were paid under protest.

[fol. 38]

14

Defendants deny that the allegations in paragraph fourteen of the Complaint to the effect that the taxes which had been levied against the west half of the SW¼ of Section 27, Township 16 North, Range 11 East, in Creek County for the year 1939 were illegally levied and assessed against said lands, but defendants admit that the taxes for said years are wholly unpaid.

Defendants admit that unless said taxes are paid within the time prescribed by the laws of the State of Oklahoma said lands will be sold pursuant to State laws for the collection of said taxes.

15

The time having expired in 1940 for the county to sell lands for advalorem taxes, said restraining order therein prayed for is no longer necessary but defendants state that they should not be interfered with in the future to sell said lands for delinquent ad valorem taxes in the event said taxes are not paid before the next delinquent ad valorem tax sale takes place in Creek County.

16

Defendants admit the allegations in paragraph sixteen of the Complaint to the effect that the defendant, county treasurer, is enjoined with the duty of collecting all ad valorem taxes in said county and its municipalities, and is now asserting and claiming a lien upon the lands above described for the amount of delinquent ad valorem taxes levied and assessed against the same for the year 1939, with penalties thereon, but deny that said ad valorem taxes have been illegally levied and assessed against said lands. Defendants state that the time for the sale of lands for delinquent ad valorem taxes for 1940 has expired but state that plaintiffs herein should not interfere with the defendant's duty to proceed with the collection of delinquent ad valorem taxes for the year 1939 upon the lands described in plaintiff's petition.

Defendants further deny that the plaintiffs are entitled to the judgment and relief prayed for in paragraph sixteen of plaintiff's complaint.

[fol. 39] 17

Further answering, if same be necessary, defendants deny that the lands involved herein are such lands as are referred to in Section 2 of the Act of Congress of June 20, 1936 (Vol. 49 U. S. St. at Lg. Art. 1, Ch. 62; page ——), or its amendment by Congress on May 19, 1937 (50 St. at Lg. 188), for the reason that said lands were not purchased with the Restricted Indian Funds by the plaintiffs herein, but the deeds attached to plaintiff's complaint show on their face the consideration to be $1.00 and love and affection," which is nothing more than a "gift inter vivo" and hence there can be no federal question involved.

Defendants further state that this court has no jurisdiction of the parties in this action as there is no diversity of citizenship, for the reason that the plaintiffs, as well as the defendants, are citizens of Creek County, and of the State of Oklahoma.

18

Defendants further state that the complaint does not state facts sufficient to constitute a valid cause of action at law or in equity against said defendants or either of them.

19

Defendants further state that the complaint shows on its face that if a cause of action ever accrued wherein said taxes were wrongfully collected by the county treasurer of Creek County, Oklahoma, that said action could and should have been maintained by said plaintiffs by paying said taxes under protest and bringing suit within the time prescribed by statute or by filing affidavit of erroneous assessment with the Board of Equalization and county treasurer of Creek County, as prescribed by the statutes of the State of Oklahoma, or that said action could have been maintained at any time within three years after payment of said taxes, which time expired before the bringing of this action.

[fol. 40] 20

Defendants further state that Exhibit F attached to plaintiff's Complaint designating property exempt from

taxation is made pursuant to the Act of Congress of June 20, 1936, as amended by the Act of May 20, 1937, "attempts to exempt from taxation as a homestead the 80 acres situated in Section 27 and the 7½ acres situated in Section 36 of Creek County," but deny that said purported instrument exempts said lands from taxation by reason of the Acts of June 20, 1936, as amended by the Act of May 20, 1937, for the reason that said lands were not purchased with the Restricted Indian Funds by the plaintiffs herein, but in truth and in fact were a gift to plaintiffs from their mother, Woosie John (now Deere, deceased).

Wherefore, defendants having fully answered, pray the court for judgment under which plaintiffs shall be adjudged nothing by reason of their suit and under which the defendants, and each of them, shall be adjudged their costs and all other and different relief in law or in equity, to either, to which they are entitled.

Mac Q. Williamson, Attorney General, By Houston Bus Hill, Assistant Attorney General. Everett S. Collins, County Attorney, Creek Co., Okla.; Kenneth Hughes, Assistant County Attorney, Creek County, Oklahoma, Attorneys for Defendants.

I have this day mailed copy of this answer to George H. Jennings, Attorney for Plaintiffs.

Houston Bus Hill, Asst. Atty. Genl., Attorney for Defendants.

[File endorsement omitted.]

[fol. 41] In United States District Court

Agreed Statement of Fact—Filed July 14, 1941

It Is Stipulated and Agreed by and between the plaintiffs and defendants in the above numbered and styled cause that the following statement of facts constitute a full, correct and complete statement of the facts upon which this cause should be submitted to and determined by the Honorable Trial Court, to-wit:

I

That the plaintiffs are now, and were at the time of the filing of this action, residents and citizens of the County of

Creek, State of Oklahoma, domiciled within the No-thern Judicial District of said State, and are unenrolled full-blood members of the Creek or Muskogee Tribe of Indians, and that the matter in controversy exceeds, exclusive of interest and costs, the sum of Five-thousand dollars ($5,000.00).

II

That the defendant, Board of County Commissioners of the County of Creek, State of Oklahoma, is a municipal corporation, organized and existing under the laws of the State of Oklahoma; that the defendant, H. L. Payne, is the duly qualified and acting County Treasurer of Creek County, State of Oklahoma, and the defendant, W. Howard Seay, is the duly qualified and acting County Assessor of said County, and W. B. Key is the duly qualified and acting County Clerk of said County.

III

That Wosey John, now Deere, deceased, was the mother of the plaintiffs, and was a full-blood member of the Creek or Muskogee Tribe of Indians, duly enrolled as such opposite roll Number 9546 of the approved rolls of said Tribe, and that at the dates mentioned in the complaint the Secretary of the Interior of the United States held in his custody a large amount of restricted Indian money belonging to her, the said Wosey John, now Deere, which money had accumulated to her credit from the sale of oil and gas from restricted Indian lands belonging to her, the said Wosey John, now Deere.

[fol. 42] IV

That on the 11th day of December, 1915, the Secretary of the Interior invested the sum of Seven-thousand-five hundred dollars ($7,500.00) from the restricted funds so held by him to the credit of Wosey John, now Deere, in the purchase in her behalf of the following described lands, situate in Creek County, Oklahoma, to-wit:

The center Fifty (50) feet of Lot Six (6), and the center Fifty (50) feet of the South Thirty-three and 41/100 (33.41) feet of Lot Three (3), Block Thirty-nine (39), of the Original Townsite of the City of Sapulpa.

That the instrument attached to the complaint as Exhibit "A" thereto is a true and correct copy of the deed

of conveyance so taken by the Secretary of the Interior at the time of the purchase of such property.

V

That on March 24, 1920, the Secretary of the Interior invested the sum of Seven-thousand-five-hundred dollars ($7,500.00) from the restricted funds so accumulated to the credit of Wosey John, now Deere, in the purchase in her behalf of the following described premises, situate in Creek County, Oklahoma, to-wit:

The West Half (W2) of the Northwest Quarter (NW4) of the Southwest Quarter (SW4) of the Southwest Quarter (SW4), and the West Half (W2) of the East Half (E2) of the Northwest Quarter (NW4) of the Southwest Quarter (SW4) of the Southwest Quarter (SW4) of Section Thirty-six (36), Township Eighteen (18) North, Range Eleven (11) East;

That the instrument attached to the complaint as Exhibit "B" thereto is a true and correct copy of the deed of conveyance so taken by the Secretary of the Interior at the time of the purchase of such property.

VI

That on December 8, 1927, the Secretary of the Interior invested the sum of Ten thousand dollars ($10,000.00) from the restricted funds so accumulated to the credit of Wosey [fol. 43] John, now Deere, in the purchase in her behalf of the following described lands, situate in Creek County, Oklahoma, to-wit:

The West Half (W2) of the Southwest Quarter (SW4), Section Twenty-seven (27), Township Eighteen (18) North, Range Eleven (11) East;

That the instrument attached to the complaint as Exhibit "C" thereto is a true and correct copy of the deed of conveyance so taken by the Secretary of the Interior at the time of the purchase of such property.

VII

That after the purchase of said lands the Secretary of the Interior expended large sums from the restricted Indian funds of the said Wosey John, now Deere, in the erec-

tion and construction of permanent and lasting improvements upon the above described lands and premises.

VIII

That on March 4, 1931, the said Wosey John, now Deere, in consideration of love and affection, made, executed and delivered to the plaintiffs her certain deed, in writing, thereby jointly conveying to the plaintiffs the above described tracts and parcels of land above described, preserving, however, to the said grantor a life estate in each of such properties and tracts of land; that said deed was duly submitted to and approved by the Secretary of the Interior of the United States on April 3, 1931. That no restricted or trust funds of the plaintiffs herein were used in the purchase of said lands, or the procurement thereof.

That the instrument attached to the compiaint as Exhibit "D" thereto is a true and correct copy of the deed of conveyance so made by Wosey John, now Deere, as aforesaid, as plead in paragraph VIII, of the complaint.

IX

That on December 10, 1937, the said Wosey John, now Deere, in consideration of love and affection made, executed and delivered to plaintiffs her certain deed, in writing, jointly conveying to the plaintiffs all of the right, title and [fol. 44] interest of the said Wosey John, now Deere, in and to the parcels and tracts of land above described. That no restricted or trust funds of the plaintiffs herein were used in the purchase of said lands, or the procurement thereof.

That the instrument attached to the Complaint as Exhibit "E" thereto is a true and correct copy of the deed of conveyance so made by the said Wosey John, now Deere, as plead in Paragraph IX of the Complaint.

X

That on December 16, 1937, plaintiffs, with the consent and approval of the Secretary of the Interior, executed the Certificate plead in Exhibit 10 of the Complaint, and that such Certificate was formally approved by the Secretary of the Interior on March 24, 1938, and the same was filed in the office of the County Clerk of Creek County, Oklahoma, on April 12, 1938; that the instrument plead as Exhibit "F" to the Complaint herein is a true and correct copy of the

original Certificate described in Paragraph X of the Complaint.

XI

That the County Assessor of Creek County, Oklahoma, assessed each of the above mentioned and described tracts of land for advalorem tax purposes in Creek County, Oklahoma, and for each of the tax years 1936 and 1937, and caused advalorem taxes to be levied and assessed against the same for each of said years, and caused such advalorem taxes to be extended upon the tax rolls of said County against such respective lands for each of said years, as follows:

(a) That the property above described as located in Block Thirty-nine (39), of the City of Sapulpa, was assessed for each of said tax years at the valuation of Twelve-thousand dollars ($12,000) and advalorem taxes in the amount of Eight-hundred-twenty-nine and 61/100 dollars ($829.61) were levied and assessed against the same and extended upon the tax rolls of said County for the tax year 1936, and advalorem taxes in the amount of Nine-hundred-seventeen [fol. 45] and 04/100 dollars ($917.04) were levied and assessed against the same and extended upon the tax rolls of said County for the year 1937.

(b) That the property above described as located in Section Thirty-six (36), aforesaid, was assessed for each of said tax years at the valuation of two-thousand-eight-hundred dollars ($2800.00), and advalorem taxes in the amount of One-hundred-thirty-six and 87/100 ($136.87) for the year 1936, and advalorem taxes in the amount of One-hundred-sixty-four and 04/100 dollars ($164.04) were levied and assessed against the same and extended upon the tax rolls of said County for the year 1937.

(c) That the property above described as located in Section Twenty-seven (27), aforesaid, was assessed for each of said tax years at the valuation of Seventeen-thousand-four-hundred dollars ($17,400), and advalorem taxes in the amount of Eight-hundred-forty-eight and 80/100 dollars ($848.80) for the year 1936, and advalorem taxes in the amount of Nine-hundred-ninety-three and 97/100 dollars ($993.97) for the year 1937, were levied and assessed against the same and extended upon the tax rolls of said County for the year 1937.

XII

That the plaintiffs have at all times since the year 1931 occupied the Eighty (80) acre tract located in Section Twenty-seven (27), aforesaid, as their home and homestead. That such lands were assessed for advalorem tax purposes in Creek County for the years 1938, 1939 and 1940 at the valuation of Seventeen-thousand-four-hundred dollars ($17,400.00), and that the County Assessor of said County caused advalorem taxes to be levied against such lands for each of said years, and caused such taxes to be extended upon the tax rolls of said county; that the respective amounts of taxes so levied against said lands for said years and so extended upon the tax rolls of said County against the same, are: For the year 1938, the sum of Eight-hundred-ninety-three and 57/100 dollars ($893.57); for the year 1939, the sum of Nine-hundred-ninety-four and 86/100 dollars ($994.86); for the year 1940, the sum of Eight-hundred-seventy and 54/100 dollars ($870.54).

[fol. 46] That the seven and one-half (7½) acre tract of land located in Section Thirty-six (36), aforesaid, was assessed for advalorem tax purposes in Creek County for the years 1938, 1939 and 1940 at the valuation of Two-thousand-eight-hundred dollars ($2,800.00), and that the County Assessor of said County caused advalorem taxes to be assessed against such lands for each of said years, and caused such taxes to be extended upon the tax rolls of said county; that the respective amounts of the taxes so levied against said lands for said years, and so extended upon the tax rolls of said County against the same, are: For the year 1938, the sum of One-hundred-forty-three and 80/100 dollars ($143.80); for the year 1939, the sum of One-hundred-sixty and 93/100 dollars ($160.93); for the year 1940, the sum of One-hundred-thirty-nine and 14/100 dollars ($139.14).

XIII

That on December 15, 1936, the defendants caused to be paid to the County Treasurer of Creek County the amount of taxes which had levied and assessed against the properties located in Block 39 of the City of Sapulpa, aforesaid, for the year 1936, and the property located in Section Twenty-seven (27), aforesaid, for the year 1936, with penalties thereon; and that such amount was received by said

defendant in satisfaction and payment of the taxes which had been so levied and assessed against such properties for said year, with penalties thereon.

That on November 14, 1939, the plaintiffs paid to the County Treasurer of Creek County the amount of taxes, with penalties thereon, which had been levied and assessed against the property located in Block Thirty-nine (39) of the City of Sapulpa, aforesaid, for the year 1937, and the taxes, with penalties thereon, which had been levied against the property located in Section Thirty-six (36), aforesaid, for the years 1936, 1937 and 1938, and the taxes, with penalties thereon, which had been levied against the property located in Section Twenty-seven (27), aforesaid, for the years 1937 and 1938; and that such money was received by said defendant in satisfaction and payment of such taxes against such properties, for said respective years, with penalties thereon.

[fol. 47] That on January 8, 1941, the plaintiffs paid to the County Treasurer of Creek County two-thirds of the amount of taxes, with penalties thereon, which had been levied against the property located in Section Thirty-six (36), aforesaid, for the years 1939 and 1940, and two-thirds of the taxes, with penalties thereon which had been levied against the property located in Section Twenty-seven (27), aforesaid, for the year 1939; and that such money was received by said defendant in satisfaction and payment of such proportionate part of such respective taxes, with penalties thereon.

That the amounts so paid by plaintiffs on said respective dates, are as follows:

Taxes Paid on December 15, 1936

Taxes levied for year 1936 on lots located in Block 39, City of Sapulpa	$ 829.61
Taxes levied for year 1936 on 80 acres in Section 27	848.80
Total taxes paid	$1,678.41
A refund was made on these taxes on May 12, 1937, in the amount of	121.08
Net amount paid on December 15, 1936	$1,557.33

Taxes Paid on November 14, 1939

Taxes levied for year 1936 on 7½ acre tract in Section 36, with penalties	$ 171.08
Taxes levied for year 1937 on 7½ acre tract in Section 36, with penalties	196.84
Taxes levied for year 1937 on Lots, Block 39, City of Sapulpa, with penalties	917.04
Taxes levied for year 1937 on 80 acre tract in Section 27, with penalties	1,192.76
Taxes levied for year 1938 on 7½ acre tract in Section 36, with penalties	156.78
Taxes levied for year 1938 on 80 acre tract in Section 27, with penalties	974.01
Total taxes paid on November 14, 1934	$3,608.51

[fol. 48] Taxes Paid on January 8, 1941

Two-thirds of taxes levied for year 1939 on 7½ acre tract located in Section 36, with penalties	117.76
Two-thirds of taxes levied for year 1939 on 80 acre tract located in Section 27	663.24
Two-thirds of taxes levied for year 1940 on 7½ acre tract located in Section 36	92.76
Total taxes paid on January 8, 1941	$ 873.76

That the defendants asserted and claimed a lien upon each of the respective tracts aforesaid for the respective amounts so levied against such lands for the years aforesaid, with penalties thereon at the rate of twelve percent (12%) per annum, and that if such taxes, with penalties accrued, had not been paid, the defendants would have advertised and sold such lands for the purpose of paying the respective amounts so due, with penalties thereon, under the provisions of the Statutes of the State of Oklahoma providing for the sale and resale of real estate for the collection of delinquent ad valorum taxes.

That the plaintiffs did not, at the time of paying the respective amounts of taxes, as hereinbefore set forth, give notice to the County Treasurer that such taxes were being paid under protest in the manner provided by Section 12,-665, Okla. Stat. 1931.

XIV

That the defendants now assert and claim a perpetual lien upon the tracts above described for the respective amounts of taxes so levied against the same for the years above mentioned which remain unpaid, and penalties are being added thereto at the rate of twelve percent (12%) per annum; and that unless such taxes, with penalties, are paid, that the defendants will offer such lands for sale and will sell the same for the purpose of collecting such taxes in the manner provided by the statutes of the State of Oklahoma relating to sale and resale of real estate for the collection of delinquent taxes.

[fol. 49] XV

That the defendant, W. Howard Seay, as County Assessor of said County, and the defendant, W. B. Key, as County Clerk of said County, are enjoined with the duty of preparing the tax rolls of said County, and that said County Assessor has listed the 80 acre tract located in Section 27, aforesaid, for ad valorem tax purposes in Creek County for the year 1941, at the valuation of Seven-thousand-five-hundred dollars ($7,500.00), and has listed the 7½-acre tract located in Section 36, aforesaid, for ad valorem tax purposes in said County for the year 1941, at the valuation of One-thousand-two-hundred dollars ($1,200.00), and that the defendant, County Assessor and County Clerk, intend to and will, unless restrained from so doing, cause ad valorem taxes to be assessed against said lands for the year 1941 at the valuations aforesaid, and, will cause such taxes to be extended upon the tax rolls of Creek County against such respective tracts of lands; and that such County Assessor and County Clerk will cause such lands to be listed and assessed in the future for ad valorem tax purposes in said County, and will cause taxes to be levied against the same unless prevented from so doing by the judgment of this Honorable Court.

XVI

That the defendant, H. L. Payne, as such County Treasurer, is enjoined with the duty of collecting all ad valorem taxes due to Creek County, and its municipal sub-divisions of government, and is now asserting and claiming a perpet-

ual lien upon such lands for the respective amounts of ad valorem taxes which have been levied against the same and which remain unpaid, and if the ad valorem taxes which are levied against said lands for the year 1941, and subsequent years, are not paid when due he will assert a lien upon such lands for the amount of such respective taxes. That if such taxes for any of such years are not paid by plaintiffs said County Treasurer will cause said lands to be advertised and sold for the purpose of collecting such taxes; in the manner provided by the Statutes of [fol. 50] the State of Oklahoma relating to the sale and resale of real estate for the collection of delinquent ad volorem taxes.

Dated this 14th day of July, 1941.

George H. Jennings, Attorney for Plaintiff. Mac Q. Williamson, Attorney General of the State of Oklahoma. Houston Bus Hill, Assistant Atty. General. Everett S. Collins, County Attorney, Creek County, Oklahoma. By Kenneth Hughes, Asst. Attorneys for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed July 21, 1941

This cause having come on for hearing on an agreed statement of facts filed herein by plaintiffs and defendants, and the court being fully advised in the premises, finds:

FINDINGS OF FACT

I

The court finds the facts in this case to be as shown by the Agreed Statement of Facts filed herein, *fo* which reference is hereby made as if fully incorporated herein.

CONCLUSIONS OF LAW

I

The court concludes that it has jurisdiction to hear and determine the issues in this case.

II

That the three tracts of land involved in this action were exempt from taxation by the State of Oklahoma, and its municipal subdivisions of Government for the years 1936 and 1937, under the provisions of the Act of Congress of June 20, 1936 (49 Stat. 1542); and that the tracts of land [fol. 51] designated as Tax Exempt in the Certificate of Tax Exemptions aforesaid, namely, the seven and one-half (7½) acre tract owned by plaintiffs and located in Section 36 above described as Tract Number 2 and the eighty (80) acre tract owned by plaintiff and located in Section 27, above described as Tract Number 3, were exempt from taxation by the State of Oklahoma and its municipal sub-divisions of Government for the years 1938 and 1939 and 1940, and such lands are now, and will continue to be exempt from taxation by the State of Oklahoma, and its municipal sub-divisions so long as the same are owned by and remain the homestead of plaintiffs and their restricted heirs, and until restrictions against alienation are removed in the manner provided by law, under the provisions of the Act of Congress of May 19, 1937 (50 Stat. 188).

III

That the taxes levied by defendants against the three tracts of land, aforesaid, for the years 1936 and 1937, and the taxes so levied by defendants against the lands described in the Certificate of Tax Exemptions for the years 1938 and 1939, were imposed in violation of the Acts of Congress, supra, and were and are illegal and void.

IV

That the payments of taxes made by plaintiffs as above set forth were made by them under compulsion and duress, and were made by plaintiff to quiet the title to their lands against the illegal and void tax lien asserted by defendants, and to prevent the accumulation of penalties and the sale of such lands for the collection of such legal and void taxes. That plaintiffs are entitled to recover from defendant, Board of County Commissioners of the County of Creek, State of Oklahoma, a municipal corporation, the respective amounts so paid by them with interest at the rate of six per-cent per annum from the date of such respective payments.

V

That the taxes so levied against the properties of plaintiff covered by the Certificate of Tax Exemptions, aforesaid, and remaining unpaid for the years 1939 and 1940, are illegal [fol. 52] and void, and should be cancelled, set aside and held for naught.

VI

That the plaintiffs are entitled to a declaratory judgment herein decreeing the lands designated as tax exempt in the Certificate of tax exemptions, aforesaid, to be exempt from taxation by the State of Oklahoma for the year 1940, and so long as such lands are owned by and remain the homestead of plaintiffs, or their restricted heirs, and until the restrictions against alienation are removed in the manner provided by law, and that an injunction should issue against the defendants, and their successors in office, perpetually enjoining and restraining such defendants from extending such lands upon the assessment lists of Creek County, Oklahoma, and from levying any taxes against the same for the year 1941, and so long thereafter as such lands shall belong to and remain the homestead of the plaintiffs, or their restricted heirs, and until the restrictions against alienation are removed in the manner provided by law.

(S.) F .E. Kennamer, Judge.

[File endorsement omitted.]

In United States District Court

Decree—Filed July 21, 1941

This cause comes on to be heard on this 17th day of July, 1941; the plaintiffs appearing by their attorney of record, George H. Jennings, and the defendants appearing by the Honorable Mac Q. Williamson, Attorney General of the State of Oklahoma, Houston Hill, Assistant Attorney General of the State of Oklahoma, and Everett S. Collins, County Attorney of the County of Creek, State of Oklahoma, and the Court having heard the evidence and being fully advised, finds the issues in favor of plaintiffs and against the defendants.

It Is Therefore Ordered, Adjudged and Decreed as follows:

That the plaintiffs do have and recover judgment against the defendant, Board of County Commissioners of the [fol. 53] County of Creek, State of Oklahoma, a municipal corporation, for the sum of One-thousand-five-hundred-fifty-seven and 33/100 dollars ($1,557.33), with interest at the rate of six per cent per annum from the 15th day of December, 1936; and that plaintiffs do have and recover judgment against the defendant, Board of County Commissioners of the County of Creek, State of Oklahoma, for the sum of Three Thousand six hundred eight and 51/100 dollars ($3,608.51), with interest at the rate of six per cent per annum from 14th day of November, 1939; and that plaintiffs do have and recover judgment against the defendant, Board of County Commissioners of the County of Creek, State of Oklahoma, for the sum of Eight-hundred-seventy-three and 76/100 dollars ($873.76), with interest at the rate of six per cent per annum from the 8th day of January, 1941.

That the following described real estate, belonging to plaintiffs, to-wit:

The West Half (W2) of the Southwest Quarter (SW4) of Section Twenty-seven (27), Township Eighteen (18) North, Range Eleven (11) East; and

The West Half (W2) of the Northwest Quarter (NW4) of the Southwest Quarter (SW4) of the Southwest Quarter (SW4), and the West Half (W2) of the East Half (E2) of the Northwest Quarter (NW4) of the Southwest Quarter (SW4) of the Southwest Quarter (SW4) of Section Thirty-six (36), Township Eighteen (18) North, Range Eleven (11) East;

were exempt from taxation by the County of Creek, State of Oklahoma, and its municipal sub-divisions of government, for the years 1939 and 1940, and that such lands will continue to be exempt from subsequent tax levies by said County, and its municipalities, so long as such lands are owned by and remain the homestead of plaintiffs, or their restricted heirs, and until restrictions against alienation are removed therefrom in the manner provided by law.

That the taxes levied against said lands for the years 1939 and 1940, by said defendants, and which remain unpaid, be, and the same are hereby decreed to be null, void and of no effect.

[fol. 54] That an injunction issue herein perpetually enjoining the defendants, and each of them, and their successors in office, from taking any steps to enforce the collection of the taxes levied against said lands, above described, for the years 1939 and 1940, or either or said years; and perpetually enjoining said defendants and each of them, and their successors in office, from extending or attempting to extend the property of plaintiff, above described, upon the assessment rolls and tax rolls of the County of Creek, State of Oklahoma, and from levying or attempting to levy advalorem taxes against the same for the year 1941, or any subsequent year during which such lands belong to and remain the homestead of plaintiffs, or their restricted heirs, until the restrictions against alienation have been removed from said lands in the manner provided by law.

That the plaintiffs have and recover their costs herein.

To which judgment the defendants except, and their exceptions are allowed.

(S.) F. E. Kennamer, Judge.

Approved as to form, and copy waived, this — day of July, 1941.

George H. Jennings, Attorney for Plaintiff. Mac Q. Williamson, Attorney General of the State of Oklahoma; by Houston Bus Hill, Assistant Attorney General; Everett S. Collins, County Attorney, Creek County, State of Oklahoma; Kenneth Hughes, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 55] In United States District Court

Notice of Appeal—Filed October 20, 1941

Notice is hereby given that these defendants: Board of County Commissioners of the County of Creek, State of Oklahoma, a municipal corporation; H. L. Payne, County Treasurer of the County of Creek, State of Oklahoma; J. Clyde Staiger, County Assessor of the County of Creek, State of Oklahoma, and W. B. Kay, County Clerk, County of Creek, State of Oklahoma, appeal to the Circuit Court

of Appeals of the Tenth Circuit from the final judgment and decree entered in this action on July 21, 1941.

Mac Q. Williamson, Attorney General, Houston (Bus) Hill, Assistant Attorney General. (Address: State Capitol, Oklahoma City, Oklahoma.); Everett S. Collins, County Attorney, Kenneth Hughes, Assistant County Attorney, Attorneys for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

APPLICATION TO SUBSTITUTE SUCCESSOR IN OFFICE PARTY DEFENDANT—Filed December 20, 1941

Come now the defendants in the above styled and numbered cause, by and through their Attorney, Houston Bus Hill, Assistant Attorney General of the State of Oklahoma, and moves the court that an order be entered herein substituting the name of W. Howard Seay, the present duly elected, qualified and acting County Assessor, J. Clyde Staiger, and for grounds therefor state:

That this action was originally commenced against the Board of County Commissioners of Creek County, State of Oklahoma, H. L. Payne, County Treasurer of Creek County; J. Clyde Staiger, County Assessor of Creek County, and W. B. Key, County Clerk of Creek County, and that summons was issued herein, and subsequent thereto J. Clyde Staiger was succeeded in office by W. Howard Seay, newly elected County Assessor of Creek County, Oklahoma; [fol. 56] and upon joint motion for substitution of party, copy of which is attached hereto, together with waiver of notice of hearing motion for substitution was filed herein on May 26, 1941; that pursuant to said joint motion and waiver the said W. Howard Seay, the present County Assessor of Creek County, Oklahoma, was substituted as party defendant in the place of J. Clyde Staiger who formerly occupied the County Assessor's office in Creek County, Oklahoma.

Defendants would further show that through inadvertence and oversight the name of J. Clyde Staiger was shown

in the caption in the decree entered on July 21, 1941, and thereafter the defendants in filing their application herein for extension of time within which to lodge appeal in the Tenth Circuit Court of Appeals inadvertently and through mistake carried forward the name of J. Clyde Staiger as County Assessor of Creek County in the caption of such application, when in truth and in fact the said W. Howard Seay was already substituted as County Assessor of Creek County, and should have been shown as such in the caption of such decree.

That all of this was an oversight and mistake on the part of the attorneys preparing these pleadings to be filed herein and the defendants respectfully request that this order should be granted at this time substituting the name of W. Howard Seay who is the present duly elected, qualified and acting County Assessor of Creek County, Oklahoma, in lieu of the name of J. Clyde Staiger whose name was inadvertently carried forward in the caption of the aforementioned pleadings as the County Assessor and one of the defendants in the above case, and this substitution will not in any way affect the rights of the plaintiffs herein.

Respectfully submitted, Mac Q. Williamson, Attorney General; Houston Bus Hill, Assistant Attorney General; Everett S. Collins, County Attorney, Creek County, Attorneys for Defendants.

[fol. 57] In United States District Court

Order Substituting W. Howard Seay as County Assessor of Creek County as Defendant in the Above Styled and Numbered Cause in Lieu and Instead of J. Clyde Staiger, His Predecessor in Office

Now on this 20th day of December, 1941, the Application of defendants to substitute W. Howard Seay as County Assessor of Creek County, Oklahoma, in lieu and instead of J. Clyde Staiger who formerly occupied such County Assessor's office, comes on for special hearing before this court, and for good cause shown, the court finds that said application should be granted.

It is, therefore, ordered, adjudged and decreed by this court that W. Howard Seay, the present duly elected, quali-

fied and acting County Assessor of Creek County, Oklahoma, be substituted in lieu and instead of J. Clyde Staiger whose name is shown as the County Assessor of Creek County, Oklahoma, one of the defendants in the above styled and numbered cause.

(S.) Royce H. Savage, District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION TO VACATE ORDER SUBSTITUTING PARTY DEFENDANT —Filed December 30, 1941

Comes now the plaintiffs in the above numbered and styled cause, and respectfully show to the Court:

That on the 20th day of December, 1941, the defendants in the above numbered and styled cause filed therein their certain motion for the substitution of the name of W. Howard Seay, as party appellant herein in lieu of J. Clyde Staiger, one of the parties who joined in the notice of appeal in this cause, and that on the same date, without any notice whatsoever to plaintiffs herein, or to their counsel of record, the defendants caused the Judge of this Honorable Court to make and enter its order herein substituting the name of W. Howard Seay in lieu of J. Clyde Staiger, as party appellant in the above numbered and styled cause.

Your plaintiffs say that said order is void for the reason [fol. 58] that the said defendants did not serve a copy of said motion upon the plaintiffs or upon their counsel, as required by Rule 5 of the Rules of Civil Procedure, and is further void, for the reason that no notice of the hearing of said motion was given to plaintiffs or their counsel, as is required by Rule 6 D of the Rules of Civil Procedure.

Your plaintiffs further say that said order is void and of no effect, for the reason that final judgment was entered in this cause on the 21st day of July, 1941, and that the time allowed for the filing and service of notice of appeal expired on the 21st day of October, 1941, and that no appeal was taken from said judgment by the said W. Howard Seay, and that the judgment so rendered against him has become final, and this court is without jurisdiction to per-

mit an amendment or correction of the notice of appeal so as to include the said W. Howard Seay.

Your plaintiffs further say that they are informed and believe, and therefore allege the fact to be that said motion was filed without the knowledge or consent of the County Attorney of the County of Creek, State of Oklahoma, whose name is annexed thereto, and without the knowledge or consent of the said W. Howard Seay for whose benefit said order was obtained.

Wherefore, plaintiff prays that the order so made and entered herein on the 20th day of December, 1941, be vacated, set aside and held for naught, and the record thereof be expunged.

(S.) George H. Jennings, Attorney for Plaintiff.

I hereby certify that I mailed true and correct copies of above motion to Hon. Mac Q. Williamson, Attorney General, and Everett Collins, County Attorney, this 29th day of December, 1941.

[File endorsement omitted.]

[fol. 59] In United States District Court

Clerk's Minutes of January 5, 1942

Enter order overruling Motion of Plaintiff to vacate order substituting party.

Royce H. Savage, Judge.

[Appeal bond in the sum of $250.00, with appellants as principals and Massachusetts Bonding and Insurance Company, Boston, Massachusetts, as surety, was filed January 16, 1942.]

[Appellants' statement of points, filed in the district court, is identical with the statement which appears at page 1.]

[The items contained in the stipulated designation of record on appeal, filed in the district court, are substantially identical with the items appearing in the designation filed in the United States Circuit Court of Appeals, page 3.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME WITHIN WHICH TO LODGE APPEAL IN THE TENTH CIRCUIT COURT OF APPEALS—Filed November 29, 1941

Now, on this 29th day of November, 1941, the defendants' Application for Extension of Time Within Which to Lodge Appeal in the Tenth Circuit Court of Appeals comes on to be be heard.

For good cause shown said application for extension of time is granted, and the defendants are hereby given thirty (30) days from November 30, 1941, within which to docket this case and file record herein on appeal with the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit.

(Signed) Royce H. Savage, District Judge.

[File endorsement omitted.]

[fol. 60] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME WITHIN WHICH TO LODGE APPEAL IN THE TENTH CIRCUIT COURT OF APPEALS—Filed December 30, 1941

Now, on this 30th day of December, 1941, the defendants' Application for Extension of Time Within Which to Lodge Appeal in the Tenth Circuit Court of Appeals comes on to be heard.

For good cause shown, said Application for Extension of Time is granted, and the defendants are hereby given twenty (20) days from December 30, 1941, within which to docket this case and file record herein on appeal with the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit.

(S.) Royce H. Savage, United States District Judge.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 61] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER OF SUBMISSION

Twenty-third Day, March Term, Wednesday, May 20th, A. D. 1942. Before Honorable Orie L. Phillips, Honorable Alfred P. Murrah and Honorable Robert L. Williams, Circuit Judges.

This cause came on to be heard and was argued by counsel, Mac Q. Williamson, Esquire, and Houston Bus Hill, Esquire, appearing for appellants, George H. Jennings, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

Mac Q. Williamson, Attorney General of the State of Oklahoma, and Houston Bus Hill, Assistant Attorney General, (Everett S. Collins, County Attorney, Creek County, Oklahoma, and Kenneth Hughes, Assistant County Attorney, Creek County, Oklahoma, were with them on the brief) for appellants.

George H. Jennings for appellees.

OPINION—August 22, 1942

Before Phillips, Murrah and Williams, Circuit Judges.

MURRAH, Circuit Judge, delivered the opinion of the court.

The appellees, as un-enrolled full-blood Creek Indians, instituted this suit in their own behalf against the duly constituted officials of Creek County, Oklahoma, a municipal corporation, to recover ad valorem taxes and penalties theretofore paid, plus 6% interest from the date of payment; for cancellation of the assessed and unpaid taxes, and for a judgment declaring the nontaxable status of certain lands located in Creek County, Oklahoma, of which they were the grantees from their mother, Wosey John, now Deere, (since deceased) a full-blood enrolled Creek Indian. The lands in question were purchased for and on behalf of Wosey John, now Deere, by the Secretary of the

[fol. 62] Interior from non-Indian owners [1], out of accumulated trust or restricted funds derived as proceeds from oil and gas produced from the restricted allotment of the said Wosey John, now Deere, pursuant to Section one of the Act of May 27, 1908, (35 Stat. 312).

One parcel of land purchased on December 11, 1915, consisted of property located within the city limits of Sapulpa, Oklahoma; one tract purchased March 24, 1920, consisted of 7½ acres of agricultural land; and another tract purchased December 8, 1927, consisted of 80 acres of agricultural land, all located in Creek County, Oklahoma. Each of the deeds to Wosey John, now Deere, contained a provision restricting the land against alienation or encumbrance unless approved by the Secretary of the Interior, or unless otherwise provided by law.

On March 4, 1931, the said Wosey John, now Deere, in consideration of "$1.00 and love and affection", and with the consent and approval of the Secretary of the Interior, conveyed all of the lands in question to her children and heirs (appellees here), reserving unto herself a life estate in the lands, together with the rents and profits therefrom. The deed of conveyance contained a provision against alienation or encumbrance unless approved by the Secretary of the Interior, with a further provision in the habendum clause as follows: "To have and to hold said described premises, unto said grantees, their heirs and assigns, forever, free, clear and discharged of all * * * taxes, judgments, * * * and other liens and encumbrances of whatsoever nature * * *".

Thereafter and on December 10, 1937, in consideration of "$1.00 and love and affection", the said Wosey John, now Deere, conveyed her life estate, heretofore reserved in all of the land, to the appellees. The conveyance was not approved by the Secretary of the Interior, but the Superintendent of the Five Civilized Tribes certified that the land in question was purchased for the appellees to be held in trust by the United States of America for their benefit by virtue of their being full-blood Creek Indians, not enrolled, [fol. 63] and that the deed was executed and approved pur-

[1] Although not definitely established, we assume that all of the land involved here formerly belonged to non-Indian owners, and as such was taxable by the State of Oklahoma.

suant to the Act of May 27, 1908, supra. On December 16, 1937, the appellees executed a certificate designating the agricultural lands, consisting of 87½ acres, as their homestead. The said certificate was approved by the Secretary of the Interior on March 24, 1938, and duly filed in the office of the county clerk of Creek County, Oklahoma.

Prior to 1936, all the lands in question, whether held in the name of Wosey John, now Deere, or her children (appellees here), were subject to taxation by the State of Oklahoma and its political subdivisions, McCurdy v. United States, 246 U. S. 263; United States v. Gray, 284 F. 103; United States v. Ransom, 284 F. 108, same 263 U. S. 691; see also Shaw v. Gibson-Zahniser Oil Corporation, 276 U. S. 575, and apparently taxes were levied, assessed and collected on the said lands as unrestricted and non-exempt lands in Oklahoma.

The appellees paid the ad valorem taxes and penalties levied and assessed against all the lands in question for the taxable years 1936 and 1937, and the taxes and penalties levied and assessed against the agricultural land (which had been designated as a homestead on December 16, 1937), for the taxable year 1938, and a part of the taxable years 1939 and 1940. The Creek County officials levied and assessed taxes against all of the property, including the homestead, for the taxable years 1940 and 1941, and assert the power to continue to levy and assess taxes against all of the lands in question, and to collect the taxes by sale as provided by the laws of Oklahoma.

Effective June 20, 1936, Congress passed an Act (Public No. 716, 49 Stat. 1542), "To relieve restricted Indians whose lands have been taxed or have been lost by failure to pay taxes, and for other purposes". By Section one of the Act, Congress appropriated $25,000.00 to be expended under rules and regulations prescribed by the Secretary of the Interior for the payment of taxes, penalties, and interest assessed against individually owned Indian lands, the title to which is held subject to restrictions against alienation or encumbrance, except with the consent or approval of the Secretary of the Interior, and heretofore purchased out of trust or restricted funds of an Indian, where the [fol. 64] Secretary finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase it would be nontaxable, and for redemp-

tion or reacquisition of any such lands heretofore or hereafter sold for nonpayment of taxes.

Section two of the Act provides, "All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance, except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of the said Indian, are hereby declared to be instrumentalities of the Federal Government, and shall be nontaxable until otherwise directed by Congress". (See Senate Report No. 2168, 74th Congress, Second Session. House Report No. 2398, 74th Congress, Second Session).

After passage of the Act of June 20, 1936, supra, it was found that the provisions of Section two thereof would apply to lands and other property purchased by restricted Indian funds which would exempt from taxation vast quantities of property, such as business buildings and farm lands which were not homesteads, and would consequently place an unfair burden upon taxable lands included within the taxing jurisdiction. Accordingly, the Commissioner of Indian Affairs appeared before the Senate Committee on Indian Affairs and suggested an amendment to the Act of June 20, 1936, supra. (See Senate Report No. 332, 75th Congress, First Session). Accordingly, the Act of May 19, 1937 (Public No. 96, 50 Stat. 188, Title 25 USC 412 (a)), amended Section two of the Act of June 20, 1936, supra, to read as follows: "*All homesteads*, heretofore purchased out of trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress; Provided, That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior: And provided further, That the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of 160 acres, or the village, town, or city property, not exceeding in cost $5,000.00, to be designated as a homestead".

Tax immunity as to all the lands involved is asserted for [fol. 65] the years 1936 and 1937 under the provisions of Section two of the Act of June 20, 1936, supra, while immunity is claimed on the designated homestead only for the

years 1938, 1939, 1940 and thereafter, under the provisions of the amendatory Act of May 19, 1937, supra. The principal question for decision is whether all the lands are exempt from ad valorem taxation under the Act of June 26, 1936, supra, for the period during which the said Act is applicable; and whether the designated homestead is exempt from taxation under the amendatory Act of May 19, 1937, supra, for the period during which it is applicable. Subsidiary to the principal question is the determination of the taxable period during which the original and the amendatory acts are applicable to the lands involved.

The trial court sustained the contentions of the appellees, gave judgment for the amount of the taxes and penalties paid, plus 6% interest from the date of payment; cancelled the assessed but unpaid taxes and penalties as illegal and void, and perpetually enjoined the taxing authorities (appellants here) from further levy or assessment of ad valorem taxes on the designated homestead. 38 Fed. Supp. 731.

On appeal, as below, the jurisdiction over the subject matter is challenged for lack of diversity of citizenship, but clearly, the controversy involves the validity, construction, or effect of a law of the United States, upon the determination of which the result depends. The right or immunity asserted here is such that it will be supported if the law is given one construction and effect, and defeated if it receives another. Shulthis v. McDongal, 225 U. S. 561; Gully v. First National Bank, 299 U. S. 109. The requisite amount in controversy is present and the court had jurisdiction of the subject matter regardless of diversity of citizenship.

The consfitutionality of the acts involved here is also challenged on the grounds that Congres is without power, under the Federal instrumentality doctrine, to create a tax-free instrumentality from otherwise taxable lands by purchase of the same with trust or restricted funds of a restricted Indian, and by prohibiting their alienation without the consent and approval of the Secretary of the Interior.

Undoubtedly the Secretary of the Interior was authorized to purchase the lands in question from the trust or re- [fol. 66] stricted funds of Wosey John, now Deere, and to restrict their alienation or encumbrance without the Secretary's consent and approval. Section one of the Act of May 27, 1908, supra; Sunderland v. United States, 266 U. S. 226; United States v. Law, 250 F. 218; United States v. Brown,

8 F. 2d 564; United States v. Goldfeder, 112 F. 2d 615. Likewise the Secretary of the Interior was authorized to approve the conveyance from Wosey John, now Deere, to her full-blood restricted children, subject to the same restrictions, and the said lands retained their restricted character in the grantees. Clinkenbeard v. United States, 109 F. 2d 730, and Act of January 27, 1933 (47 Stat. 777).

Aside from the historically paramount power of Congress to legislate for and on behalf of its Indian wards, United States v. Kagama, 118 U. S. 375; Cherokee Nation v. Hitchcock, 187 U. S. 294; United States v. Rickert, 188 U. S. 432; Tiger v. Western Investment Company 221 U. S. 286; Choate v. Trapp, 224 U. S. 665; United States v. Wright, 53 F. 2d 300, the State of Oklahoma, has by acceptance of statehood under Section one of the Enabling Act (Act of June 16, 1906, 34 Stat. 267), conceded the power and authority of the United States government to make any law or regulation respecting Indians, their lands, property, or other rights by treaties, agreement, law or otherwise. Tiger v. Western Investment Company, supra; Ex Parte Webb, 225 U. S. 663, 678; United States v. Sandoval, 231 U. S. 28, 48. The State of Oklahoma has recognized the paramount jurisdiction of the Federal Government to legislate for and on behalf of its Indian wards with respect to lands located within state boundaries. Gleason v. Wood, 28 Okla. 502, 114 Pac. 703, 705; McIntosh v. Dill, 205 Pac. 917; Wynn v. Fugate, 299 Pac. 890; United States v. Board of Commissioners of Osage County, 26 F. Supp. 270, 275. By these acts (Acts of June 20, 1936 and May 19, 1937, supra), Congress has assumed a guardianship over the affairs of restricted Indians, with respect to which it has the indubitable power to legislate and by such legislation to protect its guardianship against encroachment or impairment by the state through its taxing powers.

But the restrictions against alienation imposed by the Secretary of the Interior, in virtue of his power and duty [fol. 67] to supervise Indians and Indian affairs, does not without more operate to effect an immunity from state taxation. Restrictions against alienation imposed by the Secretary of the Interior does not necessarily create a tax-free government instrumentality. McCurdy v. United States, supra; United States v. Gray, supra; United States v. Ransom, supra; Shaw v. Gibson-Zahniser Oil Corporation, supra; Choteau v. Burnet, 283 U. S. 691; Superintend-

ent v. Commissioner, 295 U. S. 418; Landman v. Commissioner of Internal Revenue, 123 F. 2d 787. Lands allotted to individual Indians in pursuance of a treaty or act of Congress, by the terms of which it is agreed between the United States Government and the tribe, assented to by the state, that the lands thus allotted in severalty shall remain tax free for a stipulated period, creates a vested property right in the individual allottee which neither the national nor state government may impair or invade. It is a vested property right protected by the constitution, and any attempt to invade or impair will be judged in the light of the treaty obligations of the United States, and especially in the light of the obligation which the United States Government has historically assumed in relation to its intercourse with the Indian tribes. (Act of June 28, 1898, 30 Stat. 495, 507; Act of May 27, 1908, 35 Stat. 312). United States v. Thurston County, 143 F. 287; United States v. Rickert, supra; Carpenter v. Shaw, 280 U. S. 363; Choate v. Trapp, supra; Ward v. Love County, 253 U. S. 17; Bryan County v. United States, 123 F. 2d 782.

But unlike lands allotted in severalty to members of the Five Civilized Tribes, under an agreement or treaty, providing for immunity from taxation until removed by the terms of the agreement or treaty, tax immunity here depends upon the express will of Congress, and must be found within the plain terms of the legislation relied upon to effect the exemption. Shaw v. Gibson-Zahniser Oil Corporation, supra. By the Act of June 20, 1936, as amended by the Act of May 10, 1937, supra, Congress has plainly expressed a purpose to protect lands purchased with trust or restricted funds of a restricted Indian so long as the said lands are restricted from alienation without the approval of the Secretary of the Interior, and to effect that purpose, Congress has declared such lands to be instrumentalities of the Fed-[fol. 68] eral Government and exempt from taxation until otherwise directed by Congress. The history of the legislation, as well as the text of the acts, indicates quite clearly a Congressional purpose to fulfill its obligation to this particular class of Indians arising out of an erroneous assumption that the restricted character of the lands in question operated to create a tax-free instrumentality by necessary implication. See McCurdy v. United States, supra; Shaw v. Gibson-Zahniser Oil Corporation, supra; United States v. Ransom, supra; United States v. Gray, supra; Landman

v. Commissioner of Internal Revenue, supra; Superintendent v. Commissioner, supra.

But the appellants contend that in order to come within the scope of Section two of the Act of June 20, 1936, supra, the lands must have been "heretofore purchased with trust or restricted funds of the said Indian", and that since March 4, 1931, and particularly for the taxable years 1936 and 1937, the lands sought to be taxed were held not by the restricted Indian whose trust or restricted funds purchased the land, but by the grantees of the said Indian as a gift; that none of the lands was purchased by the restricted funds of the appellees, hence they do not come within the purview of the Act declaring a government instrumentality.

It is true that no trust or restricted funds of the appellees were invested in the lands in question. The appellees held the same as a gift from their mother, whose trust or restricted funds were used to purchase same, and it may be admitted that when considered by its technical language, without regard to its natural meaning or purpose, and without relation to the amendment (May 19, 1937), there is cause for doubt concerning the application of the original act to lands, the title to which has passed from the Indian whose trust or restricted funds purchased the same. But when, on March 4, 1931, Wosey John, now Deere, conveyed the lands to the appellees, she, by express language in the deed of conveyance, retained unto herself a life estate, together with the improvements thereon and the rents and profits therefrom. She warranted the title against judgments, taxes, liens, and encumbrances of whatsoever nature. As such life tenant, she held the dominant and taxable estate, and it was her statutory duty to pay all lawful taxes levied against the land so long as she retained the life estate. Revised Laws of Oklahoma of 1910—6664; 60 O. S. A. 69; [fol. 69] Helm v. Belvin, 232 Pac. 382; Riley v. Collier, 238 Pac. 491; Waldon v. Baker, 88 Pac. 2d 352; Tiffany on Real Property, Vol. 1, Sec. 63; 17 A. L. R. 1384; 94 A. L. R. 311.

It follows that she is entitled to the tax immunity granted by the Act whilst she owned the dominant estate, and the appellees, as vested remaindermen, are entitled to the benefits of the tax immunity which attached to the land while Wosey John, now Deere, held the life estate therein. Since Wosey John, now Deere, retained the life estate until December 10, 1937, and until after the effective date of the amendatory Act of May 19, 1937, all the lands in question

were immune from taxation for the period during which the original Act is applicable as "lands heretofore purchased out of trust or restricted funds of the said Indian." When on December 10, 1937, Wosey John, now Deere, conveyed her life estate in the lands to the appellees, and the appellees became obligated to pay all lawful taxes assessed against the land, the Congress had previously and on May 19, 1937, eliminated the ambiguity provoking language contained in the original act by declaring that all homesteads heretofore purchased with trust or restricted funds of an *individual Indian*, restricted against alienation without the approval of the Secretary of the Interior, were instrumentalities of the Federal Government and exempt from all taxes, provided the homestead was selected in accordance with the amendment. Consequently, the homestead, when designated, is embraced within the amendatory Act of May 19, 1937, and is exempt from taxation for the period during which it is applicable. The agricultural lands were selected and designated as a homestead by the appellees on December 16, 1937, six days after acquisition of title thereto on December 10, 1937. The designation was not formally approved by the Secretary of the Interior until March 4, 1938, but we think the formal approval by the Secretary related back to the date of the designation.

The taxable year in Oklahoma is the fiscal year and begins July first and not January first. Real estate is assessable in the name of the owner thereof on January first of any year, and the taxes thus assessed are levied as of July first of the same year, which is the beginning of the current, fiscal, and taxable year. In re Texas Company's Assessment, 31 Pac. 2d 929. Real estate assessable in the name of [fol. 70] the owner on January first of any year does not change its taxable status or become exempt from taxation for the ensuing taxable year beginning July first, because it acquired a nontaxable character between the date of the assessment on January first and the date of the levy on the following July first. Board of Commissioners of Comanche County v. Central Baptist Church, 276 Pac. 726; as corrected In re Texas Company's Assessment, supra, p. 931. The taxable status of all property in Oklahoma is fixed as of January first of each year for the ensuing taxable year beginning July first, and its status as fixed on that date is not changed by intervening circumstances affecting its taxability between the date of the assessment and the levy date.

In re Assessment of Champlin Refining Company, 99 Pac. 2d 880. It follows that property not assessable as of January first of any year, because exempt from taxation, is nontaxable for the following fiscal and taxable year beginning July first, although it may have become subject to taxation between the assessment date on January first and the levy date on the following July first. In re Sinclair Prairie Oil Company, 53 Pac. 2d 221, 229. See also In re Assessment of Champlin Refining Company, supra.

The exemption granted here is based upon the power of the Federal Government to create a Federal instrumentality out of lands heretofore taxable by the State of Oklahoma, and to immunize them against state taxation. But there is nothing in the acts here involved indicating an intention or purpose to disfupt the orderly procedure by which the State of Oklahoma pursues its statutory scheme of taxation, so long as such procedure does not circumvent or proscribe the declared purpose of the national enactment. We see no reason here to depart from the orderly procedure as outlined by the state law in the determination of the period in which the respective exempting acts have application to the lands embraced within the compass of the Acts. The right to be vindicated is a Federal right, but state laws have a distinct relevancy and they are entitled to a respectful consideration. Their observance here will result in a synchronization of state and Federal law and give vitality to both, while to ignore them would result in doubt and confusion. Board of Commissioners of Jackson County v. United States, 308 U. S. 343; Cf. United States v. Alabama, 313 U. S. 274.

[fol. 71] When measured by this rule, all of the lands in question were subject to taxation and therefore assessable on January 1, 1936, on which date the taxable status was fixed; they were therefore subject to taxation on the levy date which was July 1, 1936 for the ensuing taxable year ending June 30, 1937, although declared exempt from state taxation on June 20, 1936.

By the same rule, all of the lands in question, having been declared exempt from taxation on June 20, 1936, were not subject to taxation by the state, therefore nonassessable on January 1, 1937, for the ensuing fiscal and taxable year beginning July 1, 1937. The lands were therefore exempt from taxation for the taxable year beginning July 1, 1937. In re Sinclair Prairie Oil Company, supra; In re Assessment of Champlin Refining Company, supra.

On January 1, 1938, all of the lands, except the designated homestead, were assessable for taxation because nonexempt under the amendatory Act of May 19, 1937, and the homestead having been selected in accordance with the amendment by the appellees on December 16, 1937, was exempt from taxation for the taxable year beginning July 1, 1938, and thereafter, so long as restricted against alienation without the approval of the Secretary of the Interior or until otherwise directed by Congress.

It is also contended that since the appellees did not pursue the statutory remedy provided by Section 12665 O. S. 1931, (68 O. S. A. 263 - 15.59 and 15.50), which remedy is exclusive, they may not by these proceedings recover the taxes paid without protest. But it is true, as the appellants concede, that the appellees were put to the choice of either paying the taxes assessed and levied against the property, or having the lands sold to satisfy the same as provided by the laws of Oklahoma. The taxes were therefore not paid voluntarily, but under compulsion and duress. Ward v. Love County, supra, p. 24; Carpenter v. Shaw, supra, p. 369. "This exemption is not subject to violation by the state tax laws or administrative officials, directly or indirectly. So far as the state taxing power is concerned, the exempt lands do not exist," and to the extent herein observed, "The land is as effectively without the pale of the tax laws and their administration as if they were located in another state. All proceedings of the taxing power, having [fol. 72] as their effect a violation of this exemption, are without jurisdiction and void, * * *." Hutchinson v. Brown, 167 Pac. 624, 628. See also Johnson v. Jackson, 9 Pac. 2d 950.

The above authorities relate to a tax deed covering tax exempt lands, but we think the principle has application here. It follows that the right to recover taxes, illegal and void because beyond the jurisdiction of the taxing authorities, cannot be made to depend upon any procedural requirements of the State of Oklahoma, the effect of which would deny a vested right of immunity granted by a law of the United States. Carpenter v. Shaw, supra. See also Board of Commissioners of Jackson County v. United States, supra.

The contention with reference to the statute of limitations need not be noticed since we hold that all of the lands involved here were not exempt from taxation for the taxable

year beginning July 1, 1936 and ending June 30, 1937, hence the taxes levied, assessed, and paid for this period, together with the penalties, were lawful and not recoverable. All other taxes assessed and paid, and held to be illegal and void, are concededly within the statute of limitations.

We conclude that the trial court erroneously granted a recovery for the taxes and penalties for the taxable year beginning July 1, 1936; furthermore the allowance of interest on the taxes paid, held to be illegal and void, is disallowed under the authority of Board of Commissioners of Jackson County v. United States, supra; Bryan County v. United States, supra.

As modified, the judgment is affirmed.

DISSENTING OPINION

WILLIAMS, Circuit Judge, Dissenting:

This appeal involves a judgment in favor of plaintiffs below (appellees herein), to-wit, Evelyn Seber, otherwise designated as Osharsha John, Jimmie Powshiek, and Juanita Deer, now McIntosh, children of Wosey John, afterward Deere, now deceased, aaginst defendants below (appellants herein), to-wit, Board of County Commissioners of Creek County, and its treasurer and assessor and clerk, for taxes [fol. 73] paid on December 15, 1936, levied for said year on lots located in Block 39, original townsite of Sapulpa, Creek County, Oklahoma, $829.61, and for year 1936 on 80 acres allotted in Section 27, $848.80, total amount paid $1678.41, with refund on May 12, 1937 on $121.08, net amount paid on said December 15, 1936 of $1557.33, and for ad valorem taxes paid on November 14, 1939 levied as follows: for year 1936 on 7½ acres allotted land in Section 36, including penalties, $171.98, for year 1937 on said 7½ acres in Section 36, with penalties included, $136.87, for year 1937 on said Lots in Block 39, City of Sapulpa, including penalties, $917.04, for year 1937 on said 80 acres in Section 27, including penalties, $993.97, for year 1938 on said 7½ acres in Section 36, including penalties, $164.04, for year 1938 on said 80 acres in Section 27, including penalties, $799.67, total taxes for 1938 in Section 27, including penalties, $143.80, total taxes, etc., paid November 14, 1939, $3608.51. Ad valorem taxes paid on January 8, 1941: Two thirds of taxes levied for year 1939 on said 7½ acres in Section 36, including penalties, $117.76, two-thirds of taxes levied for year

1939 on said 80 acres in Section 27, including penalties, $663.24, two-thirds of taxes levied for year 1940 on said 7½ acres in Section 36, including penalties, $92.76, total taxes paid on January 8, 1941, $873.76.

Said lots are described as follows:

Center 50 feet of Lot 6, and the center 50 feet of the South 33.41 feet of Lot 3 in Block 39, in the City of Sapulpa (original townsite) Creek County (in the Creek Nation).

Said 80 acres in Section 27 as follows:

W½ SW¼, Section 27, Township 18 North, Range 11 East, Creek County, Oklahoma.

Said 7½ acres in Section 36 as follows:

W½ NW¼ SW¼ SW¼ and W½ E½ NW¼ SW¼ SW¼, Section 36, Township 18 North, Range 11 East, Creek County, Oklahoma.

Interest was awarded at the rate of 6% per annum from December 15, 1936, date said taxes were paid, and likewise from November 14, 1939, and January 8, 1941, at same rate [fol. 74] of interest. Taxes not paid were adjudged to be void and of no effect, and permanent injunction awarded against collection.

The United States of America is in no way, manner, or capacity of any agency a party to this action either in the trial or appellate court, the action having been instituted and prosecuted in the individual capacity of the said plaintiffs by private attorney and counsel, without any direction in any way by the United States.

Apellants urge that the trial court (1) was without jurisdiction, no diversity of citizenship, (2) and no federal question involved, (3) that state procedure provided remedy for recovery or refund of such taxes where illegally paid, (4) same could have been paid under protest and suit brought within time as permitted by state statute, or (5) by filing affidavit for correction as to erroneous assessment with the Board of Equalization, and (6) action could have ben instituted within three years before bar of statute of limitations fell, none of which was done, and (7) not entitled to relief under Act of Congress of June 20, 1936 (49 Stat. L. 1542), as amended by Act of Congress of May 19, 1937 (50 Stat. L. 188).

Wosey John, now Deere, a full-blood member of the Muskogee (Creek) tribe of Indians, approved tribal membership (Roll No. 9546), mother of the appellees herein, deceased at time this action was tried and until date of her death the Secretary of the Interior had in his custody restricted funds belonging to her derived from restricted oil and gas royalties on her restricted allotted lands which were used for and by her through the approval and action by the Secretary of the Interior between the dates of December 11, 1915, and November 8, 1927, inclusive, to purchase parcels of land as above described, the said purchased parcels, excepting said town lots, having become unrestricted after allotment, was purchased when unrestricted with such restricted funds, and said town lots so purchased from owners thereof, a part of the original Sapulpa townsite in the Creek Nation, and which had been segregated, surveyed, bounded, laid out, platted, approved and sold and conveyed by deed or patent under supervision of the United States Government for the Creek tribe in fee without any reserved restrictions whatever thereon, by valid federal [fol. 75] act said original townsite being reserved from the Creek tribal lands, the boundaries surveyed, including blocks, lots, alleys, streets, etc., platted, appraised, sold and conveyed under the townsite provisions contained in Act of Congress of June 28, 1898 (30 Stat. 495), and Creek Supp. Treaty, June 30, 1902 (32 Stat. 500), and Original Creek Treaty, Act of March 1, 1901 (31 Stat. 861), Sections 2 and 3, and Act of Congress (30 Stat. 495), Section 30, and Sections 1, 2, 3, 11, 12, 14, Tentative Creek Treaty, September 27, 1897, contained in said Act of June 28, 1898, said lots, after due issuance and recording of deed or patent, being free of all restrictions whatever, and thereafter the laws of the United States Government applied exclusively to and over said townsite, and after erection of the state of Oklahoma on November 16, 1907, state laws applied.

The Secretary of the Interior, so far as the record discloses, neither had in his possession nor in the control or custody of his department until after death of mother September 2, 1938, any restricted funds of either one of these appellees—full blood Creeks born after March 4, 1906—in no way on the approved Creek roll as members of the tribe so as to be entitled to participate in allotments in Creek tribal lands or the distribution of tribal funds, and any participation on their part could be merely as heirs

mediately or otherwise and the only right to participate under the deeds from their mother was purely as a gift as to whether the gift in the deed carried with it the right as to continuance of restrictions in their favor would depend on whether there was an understanding or agreement on her part when the purchase on her part and conveyance was originally made to her that as to the amount of consideration for each of the three deeds to her from the original three grantors that her funds held by the Secretary of the Interior as part of her restricted royalties in such amount should be so transferred on his records for their benefit as to vest in them (appellees) and by the Secretary of the Interior then and there applied for such consideration, and that then she should hold in trust the title to said three parcels of realty for them to be later by her conveyed to them.[1] [fol. 76] There is no such proof in the record and the burden rests on appellees. She neither acquired these parcels of land as her technical Creek homestead as she had such original homestead allotted to her under Creek Treaty, nor as restricted in trust for appellees on December 11, 1915, March 24, 1920, and on December 8, 1927, as the original allotted lands had become oil producing, and with her restricted oil royalty funds the said W½ SW¼, Section 27, Twp. 18N, Range 11E, I. B. & M. (80 acres) was purchased for a home for her, and afterwards, on March 4, 1931, she executed deed (Exhibit D) with warranty conveying *jointly* to her three non-enrolled full blood children, born after March 4, 1906, with the clause contained therein prohibiting them in effect from alienating the same without consent and the approval of the Secretary of the Interior, and reserving all rents and proceeds in connection with a life estate therein which she retained in said conveyance, and on May 19, 1937 for a recited consideration of "$1.00 and love and affection," a pure gift, she conveyed to appellees *jointly* said life estate, no restricted funds on their joint part being any part of a consideration therefor. Said deed from Wosey John Deere, attached as Exhibit A to complaint (deed of December 11, 1915), contained the following clause:

"Subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell or other instrument affecting the land herein described or the title thereto, executed during the lifetime of said grantee at any time prior

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[1] Clinkenbeard v. United States, 10 Cir., 109 F. 2d 730.

to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification, unless made with the consent or approved by the Secretary of the Interior."

Certificate of the Acting Superintendent of the Five Civilized Tribes (Secretary of Interior not otherwise approving same),[2] appears as of December 11, 1915, date on which [fol. 77] said deed was executed and attached thereto, in which it is stated:

"I hereby certify that the land described in the above deed was purchased for the said Wosey John with funds Held in Trust by the United States *for her benefit from funds derived from oil royalties for restricted land, inherited by the said Wosey John*, by virtue of her enrollment as a full-blood citizen of the Creek Nation, opposite No. 9546 on the final approved rolls of citizens by blood of that Nation, and that said purchase was made and said deed was executed, and the same is hereby approved pursuant to the Regulations prescribed by the Secretary of the Interior under the Act of Congress approved May 27, 1908, and the Act approved August 1, 1914." (Emphasis supplied) (So as such enrolled full blood she held restricted inherited allotted land in addition to her allotment.)

Said deed covered said Lots 3 and 6 in Block 39, original townsite of Sapulpa, with a warranty from the grantor, as herein described.

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[2] "If Congress, in fulfillment of its duty to protect the Indians, whose welfare is the peculiar concern of the Federal Government, deems it proper to restrict for a *limited* time the right of the individual Indian to alienate land purchased for him with funds arising from the sale of other (allotted) lands originally subject to a like restriction, we are not aware of anything which stands in the way. The state of Oklahoma is not concerned, since there is no state statute, rule of law or policy, which has been called to our attention, to the contrary effect. If there were, or if the power of state taxation were involved, we should consider the *question of supremacy of power;* but no such question is presented by this record." (Emphasis supplied) Sunderland v. United States, 266 U. S. 226; United States v. Ransom, 263 U. S. 681; Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 575; United States v. Gray, 284 Fed. 103.

The Second deed (Exhibit B), dated March 24, 1920, covered W½ NW¼ SW¼ SW¼ and W½ E½ NW¼ SW¼ SW¼, Section 36, Township 18 North, Range 11 East, containing 7½ acres, with a warranty by the grantor, and containing the same clause as to restrictions as in said Exhibit A (deed), and attached there o is a statement of the Superintendent for the Five Civilized Tribes, but no approval otherwise by Secretary of Interior, as follows:

"I hereby certify that the land described in the above deed was purchased for the said Wosey Powesheik, nee John, with funds Held in Trust by the United States for her benefit derived *from oil royalties from restricted land allotted* to said Wosey Powesheik, nee John, by virtue of her [fol. 78] enrollment as a full-blood citizen of the Creek Nation, opposite No. 9546 on the final approved rolls of the citizens by blood of that Nation, and that said purchase was made and said deed was executed, and the same is hereby approved pursuant to the regulations prescribed by the Secretary of the Interior under the Act of Congress approved May 27, 1908, and the Act approved August 1, 1914." (Emphasis supplied) (So she had restricted oil royalties from her allotment.)

On November 8, 1927, Exhibit C, deed dated November 8, 1927, was executed to Wosey John Deere by American National Bank, covering W½ SW¼ of Section 27, Township 18 North, Range 11 East, containing substantially same clause as to restrictions, etc. as contained in said Exhibits A and B and the attached certificate of Acting District Superintendent for the Five Civilized Tribes, and not otherwise joined in by Secretary of the Interior.

The deed (Exhibit D) to appellees, executed on March 4, 1931, recites consideration of "$1.00 and love and affection" and that Wosey John, now Deere, "does hereby grant, bargain, sell and convey unto Osharsha John, now Evalin Seber, Jimmie Powesheik and Juanita Deere, the legal issue of their bodies * * *: W½ SW¼, Section 27, Township 18 North, Range 11 East, and W½ NW¼ SW¼ SW¼ and W½ E½ NW¼ SW¼ SW¼, Section 36, Township 18 North Range 11 East, and also Center Fifty feet of Lot 6, and Center Fifty feet of South 33.4 feet of Lot 3, all in Block 39, of the original townsite of Sapulpa," the grantor retaining all the rents and profits to be derived from all the above property, so long as she lives, that is,

the grantor retains a life estate in all of the real estate described in this deed, together with all the improvements thereon, and the appurtenances thereunto belonging, and warrant the title to the same * * * subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto shall be of any force and effect or capable of confirmation or ratification, unless made with the consent or approved by the Secretary of the Interior. And without more, at bottom of said deed was the following: "Department of the Interior, Office of Secretary, [fol. 79] Washington, D. C., April 3, 1931: The within deed is hereby approved. (signed) Jos. M. Dixon, First Assistant Secretary."

On December 10, 1937, in written instrument executed by her it is recited that said Wosey John Deere "in consideration of the sum of $1.00 and love and affection * * * does hereby grant, sell, and convey unto Osharsha John, now Evalin Seber, Jimmie Powesheik and Juanita Deere, and the legal issue of their bodies * * *: All of the life estate theretofore reserved in said described property, as shown by the Warranty Deed executed on March 4, 1931, (Exhibit D), recorded in Book 393, at page 596.

The certificate of A. M. Landman, superintendent for the Five Civilized Tribes as to said instrument of December 10, 1937, states:

"* * * the land described in the above deed was purchased for Osharsha John now Evalin Seber, Jimmie Powesheik, and Juanita Deere, * * * for their benefit, by virtue of their being full-blood Creek Indians, not enrolled, and that said purchase was made and said deed was executed and the same is hereby approved pursuant to the Act of Congress approved May 27, 1908 * * * and the regulations prescribed thereunder by the Secretary of the Interior."

The land described in said deed is as follows:

W½ SW¼, Section 27, Twp. 18N, Range 11E; and W½ NW¼ SW¼ SW¼ and W½ E½ NW¼ SW¼ SW¼, Section 36, Twp. 18N, Range 11E; and also the center fifty feet of lot six and the center fifty feet of the south 33.4 feet of lot three, all in Block thirty-nine, of the original town of Sapulpa.

As to the said lots purchased on December 11, 1915, described in Exhibit A, the certificate of Joe H. Strain, acting superintendent for the Five Civilized Tribes, attached thereto, states that same:

"* * * was purchased for the said Wosey John with funds Held in Trust by the United States *for her benefit from funds derived from oil royalties from restricted land, inherited by the said Wosey John, by virtue of her enrollment as a full blood citizen of the Creek Nation, opposite* [fol. 80] *No. 9546 on the final approved rolls of citizens by blood of that Nation.* * * *." (Emphasis supplied)

The land contained in deed (Exihibit B) dated March 24, 1920, is described as follows:

W½ SW¼, Section 27, Twp. 18N, Range 11E; and W½ NW¼ SW¼ SW¼ and W½ E½ NW¼ SW½ SW¼, Section 36, Twp. 18N, Range 11E.

Gabe E. Parker, superintendent for the Five Civilized Tribes, under date of March 24, 1920, in certificate attached thereto, states that the land described in said deed was purchased "for the said Wosey Powesheik, nee John, with funds held in trust by the United States, for her benefit derived from oil royalties *from restricted land allotted to said Wosey Powesheik, nee John*, by virtue of her enrollas a full blood citizen of the Creek Nation, opposite No. 9546 on the final approved rolls of the citizens by blood of that Nation, and that said purchase was made and said deed was executed; and the same is hereby approved pursuant to the regulations prescribed by the Secretary of the Interior under the Act of Congress approved May 27, 1908, and the Act approved August 1, 1914."

As to Exhibit C, deed executed on November 8, 1927, the land described therein being:

W½ SW¼, Section 27, Twp. 18N, Range 11E, (80 acres) A. G. McMillan, acting district superintendent for the Five Civilized Tribes, in certificate attached thereto, dated November 8, 1927, states:

"* * * the land described in the above deed was purchased *for a home for the said Wosey John Deere*, with funds held in trust by the United States for her benefit derived from the sale of oil and gas royalties *from her*

restricted allotment by virtue of her enrollment as a full blood citizen of the Creek Nation, opposite No. 9546 on the final approved rolls of citizens by blood of that Nation, and that said purchase was made and said deed was executed and the same is hereby approved pursuant to the regulations prescribed by the Secretary of the Interior under [fol. 81] the Act of Congress approved May 27, 1908, and the Act approved August 1, 1914."

At the time of the execution of the deeds and the certificates of December 11, 1915 and March 24, 1920, Gabe E. Parker was superintendent for the Five Civilized Tribes and remained in such capacity until March 4, 1921, and Joseph H. Strain, during that period, was assistant superintendent, and on November 8, 1927 A. G. McMillan was acting superintendent. Exhibit D has no certificate attached, merely the statement:

"Washington, April 3, 1931. The within deed is hereby approved (signed) Jos. M. Dixon, First Assistant Secretary."

On December 10, 1937, Wosey John, now Deere, conveyed all of her life estate theretofore reserved in said described property as shown by the warranty deed executed on March 4, 1931 (Exhibit D heretofore referred to), and *certificate* attached to said deed of *December 10, 1937* recites that the land described in said deed was purchased for Osharsha John now Evalin Seber, Jimmie Powesheik, and Juanita Deere, etc., when all other certificates heretofore set out as then and there made at the time the land was purchased proves to the contrary. Certificate designating property exempt from taxation (Exhibit F), signed by Landman, superintendent, dated December 16, 1937, certifies that:

"Pursuant to Section 2 of the Act of June 20, 1936 (49 Stat. 1542), as amended by the Act of May 19, 1937 (Public 96, 75th Congress, First Session), the following designated restricted Indian lands purchased prior to May 19, 1937, out of the trust or restricted funds of Osharsha John, now Evalin Seber, Jimmie Powesheik, and Juanita Deere, a minor. An Indian of the Creek (Tribe-Band-Nation) are hereby selected and designated as a tax exempt homestead to remain non-taxable until otherwise directed by Congress." (description following)

That certificate is at absolute variance with and contrary to the prior official recitals and records as to the lands, funds and royalties shown by official certificates as herein-[fol. 82] before set out, and are as court claimed in Exhibit F, erroneous.

Exhibit F, "Certificate Designating Property Exempt from Taxation, Place, Sapulpa, Okla., Date December 16, 1937, pursuant to Section 2 of the Act of June 20, 1936 (49 Stat. 1542), as amended by Act of May 49, 1937 (Public 96, 75th Congress, First Session), the following designated restricted Indian lands as purchased prior to May 19, 1937 out of the restricted funds of Osharsha John, now Evaline Seber, Jimmie Powesheik, and Juanita Deere, a minor, an Indian of the Creek (Tribe-Band-Nation) are hereby selected and designated *as a tax exempt homestead* (for the three appellees) *to remain non-taxable until otherwise directed by Congress.*

"Description:

"W½ SW Sec. 27, Twp. 18N, Range 11E & W½ NW SW SW & W½ E½ NW SW SW Sec. 36, Twp. 18 N. Range 11 E; Creek County, Okla.

Area 87½ acres (if agricultural and/or grazing lands)—(if village, town or city property).

Osharsha John now Evaline Seber
Jimmie Powesheik
Juanita Deere (a minor)

A. M. Landman, Superintendent of Five Civilized Tribes for Juanita Deere, minor. Department of the Interior, Washington, D. C.

———————Unreadable.

Approved: Date March 24, 1938
Oscar L. Chapman, Assistant Secretary. Sig. WW.

"To be designated by the Indian. The Superintendent to make such designation for all minors; when the Indian is non compos mentis: and in those cases where the Indian fails to designate within a reasonable time. 5379 Received December 27, 1937. Five Civilized Tribes. Office of Indian Affairs. Received December 31, 1937. 79539. Received April 9, 1938. 6163. Supt. Five Civ. Tribes."

Said certificate as to exemption was filed in office of county clerk of Creek County, Oklahoma, on April 12, 1938.

Act of June 20, 1936, as amended by Act of May 19, 1937, [fol. 83] provides that "all lands, the title of which is now

held by an Indian *subject to restrictions against alienation or encumbrance * * * heretofore purchased out of trust or restricted funds of said Indian*, are hereby declared to be *instrumentalities of the Federal Government and shall be non-taxable until otherwise directed by Congress.*" (Emphasis supplied)

Same was not heretofore purchased out of such funds. All of said tracts other than the said town lots were originally allotted as restricted allotments or Creek lands to enrolled members of the Creek tribe, but had become unrestricted before acquired *by and for* Wosey John Deere. One parcel was purchased by and for her with her restricted funds from her allotted oil royalties on December 11, 1915, said purchased parcel consisting of said town lots in the original townsite of Sapulpa, having become unrestricted against alienation as title in fee passed by proper conveyance and with consideration therefor paid and had passed over to the United States Government for the Creek tribe, another on March 24, 1920, and still another on December 8, 1927.

She retained in said deeds a life estate in said realty, including rents and profits accruing therefrom during such period with the restrictive clause therein against alienation, etc., as to the three joint grantees.[3]

[3] Section 1, Enabling Act, June 16, 1906 (34 Stat. 267), Laws Relating to the Five Civilized Tribes of Oklahoma, 1890-1914, pp. 482-495 (34 Stat. 137), provides:

"That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or effect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed."

Subdivision 3 of Section 3 thereof:

"That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands dying within said limits

[fol. 84] In Ex Parte Webb, 225 U. S. 663, 32 S. Ct. 769, it is stated:

"It is not our purpose to qualify the doctrine established by repeated decisions of this court that the admission of a new state into the Union on an equal footing with the original states imports an equality of power over internal affairs. * * *

"The most recent decision of this court upon the subject of the proper construction of acts of Congress passed for the admission of new states into the Union in Coyle v. Smith, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688; where it was held that the Oklahoma enabling act (34 Stat. at L. chap. 3335, p. 267), in providing that the capital of the state should temporarily be at the city of Guthrie, and

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owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. That land belonging to citizens of the United States residing without the limits of said State shall never be taxed at a higher rate than the land belonging to residents thereof; that no taxes shall be imposed by the State on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use."

Art. 1, Section 3, Constitution of Okla. and Enabling Act, 2d Ed., Ann. (Williams) pp. 333-338, provides:

"The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. Land belonging to citizens of the United States residing without the limits of the State shall never be taxed at a higher rate than the land belonging to residents thereof. No taxes shall be imposed by the State on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use."

See, also, 61 Pacific Reporter 2d 1139.

should not be changed therefrom previous to the year 1913, ceased to be a limitation upon the power of the state after its admission. The court, however, was careful to state (221 U. S. 574): "It may well happen that Congress should embrace in an enactment introducing a new state into the Union legislation intended as a regulation of commerce among the states, or with Indian tribes situated within the limits of such new state, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement [fol. 85] or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because *the power of Congress extended to the subject*, and therefore would not operate to restrict the state's legislative power in respect of any matter which was not plainly within the regulating power of Congress'." (Emphasis supplied). See also, State of Okla. v. Gulf, C. & S. F. R. Co., 220 U. S. 290; Id. v. Chicago, R. I. & P. R. Co., 220 U. S. 302.

Section 442 a, Title 25 U. S. C. A., provides:

"All homesteads, heretofore purchased out of the *trust or restricted funds of individual* Indians, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress: Provided, That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior: And provided further, that the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town, or city property, not exceeding in cost $5,000, to be designated as a homestead. (June 20, 1936, c. 622, Section 2, 49 Stat. 1542; May 19, 1937, c. 227, 50 Stat. 188.) (Emphasis supplied)

Prior to April 26, 1931 restricted lands of the members of the Five Civilized Tribes, that is, restricted allotments of living full blood allottees and such restricted allotted tribal lands inherited by or devised to full bloods were restricted and in many instances on account of unexpired treaty pro-

vision and enactments pursuant thereto exempt from ad valorem taxation by the State of Oklahoma. By Section 4 of Act of May 10, 1928, 45 Stat. 495, it was declared that on and after said April 26, 1931 all restricted lands of members [4] of the Five Civilized Tribes allotted, inherited or held under devise in *excess* of 160 acres, shall be subject to taxa- [fol. 86] tion by the state in accordance with the laws thereof. With respect to restricted allotments of living allottees the Secretary of the Interior alone then had authority to remove therefrom restrictions against alienation. Lands inherited by or held under devise by full blood members were subject to restrictions against alienation in that no conveyance by them should be valid unless approved by the County Court having jurisdiction of the settlement of the estate of the deceased allottee. Harris et al. v. Bell et al., 254 U. S. 103, 41 Sup. Ct. 49; Parker et al. v. Richard et al., 250 U. S. 235, 39 Sup. Ct. 442.

Act of May 27, 1908 (35 Stat. 312) provides that the status of lands allotted heretofore or hereafter to allottees [5] of the Five Civilized Tribes shall, as regards restrictions, alienations or encumbrances, be as follows:

"All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands except *homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood*, and all *allotted lands of enrolled full-bloods*, and *enrolled* mixed-bloods of three-quarters or more Indian blood, including minors *or* such degrees of blood, shall not be subject to alienation, etc." (Emphasis supplied)

The history of this legislation as to restrictions on the part of Congress affecting the Indians shows a continuous purpose to give the Indian a more independent and responsible status as a citizen and property owner, and disclosing a gradual relinquishment of restrictions upon lands origin-

[4] Enrolled on official roll.
[5] Enrolled members of the Tribe.

ally allotted and encouraging the acquisition of other property, gradually enlarging control until independent management is achieved, and justified, and whilst withdrawing allotted lands from former restrictions that the Indian [fol. 87] might assume his place as a citizen and be expected to bear the same burdens of citizens of the same class whether Indian, white, or black. Mitchell v. Metcalf and Eddy, 269 U. S. 514.

Act of Congress of June 2, 1924 (43 Stat. 253), as a climax of such purpose, provides:

"All Indians born within the territorial limits of the United States are declared to be citizens of the United States. The granting of citizenship to Indians shall not in any manner affect the right of any Indian to tribal or other property."

An exemption as to taxation created by contract in the treaties between United States and Five Civilized Tribes is inviolate. Choate v. Trapp, 224 U. S. 665.

Act of Congress, February 10, 1942 (c. 56 — 2d session, Public Laws 449—77th Cong., S. 1412) entitled "An Act to amend the Act of June 11, 1940 (Public, Numbered 590, Seventy-sixth Congress, third session), providing for the relief of Indians who have paid taxes on allotted land, provides:

"The Act of June 11, 1940 (Public; Numbered 590, Seventy-sixth Congress, ch. 315, third session, 25 U. S. C. A. Section 352c) be, and the same is hereby, amended to read:

"'The Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to reimburse Indian allottees, or Indian heirs or Indian devisees of allottees, for all taxes paid, including penalties and interest, on so much of their allotted lands as have been patented in fee prior to the expiration of the period of *trust* without application by or consent of the patentee: Provided, That if the Indian allottee, or his or her Indian heirs or Indian devisees, have *by their own act accepted* such patent no reimbursement shall be made for taxes paid, including penalties and interest, subsequent to acceptance of the patent: Provided further, That the fact of such acceptance

shall be determined by the Secretary of the Interior. (Emphasis supplied)

"'In any case in which a claim against a State, county [fol. 88] or political subdivision thereof, for taxes collected upon such lands during the trust period has been reduced to judgment and such judgment remains unsatisfied in whole or in part, the Secretary of the Interior is authorized, upon reimbursement by him to the Indian of the amount of taxes including penalties and interest paid thereon, and upon payment by the judgment debtor of the costs of the suit, to cause such judgment to be released: Provided further, That in any case, upon submission of adequate proof, the claims for taxes paid by or on behalf of the patentee or his Indian heirs or Indian devisees have been satisfied, in whole or in part, by the State, county, or political subdivision thereof, the Secretary of the Interior is authorized to reimburse the State, county, or political subdivision for such amounts as may have been paid by them.'

"Sec. 2. There is hereby authorized to be appropriated the sum of $95,000, or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated, for the purpose of carrying out the provisions of this Act.

"Any appropriations made pursuant to this section shall remain available until expended."

(That evidently means when the United States was a party to such actions.)

Section 1 of Act of June 20, 1936 (49 Stat. L. 1542) provided:

"That there is hereby authorized to be appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of $25,000.00 to be expended under such rules and regulations as the Secretary of the Interior may prescribe, for payment of taxes, including penalties and interest, assessed against *individually* owned Indian land the title to which is held subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, *heretofore purchased out of trust or restricted funds of an Indian, where the Secretary finds that such land was purchased with the understanding and belief on the part of said* [fol. 89] *Indian that after purchase, it would be nontaxable,*

and for redemption or reacquisition of any such land heretofore or hereafter sold for nonpayment of taxes." Emphasis supplied.)

The passage of this act containing this appropriation as well as act of February 10, 1942, was occasioned by developments disclosed in United States v. Board of Co. Comm'rs., 6 Fed. Supp. 401; United States v. Board of Co. Comm'rs., 13 Fed. Supp. 641; Board of Co. Comm'rs. of Caddo County, Okla. v. United States, 10 Cir., 87 F. 2d 55; Board of Co. Comm'rs. of Jackson County, Kan. v. United States, 10 Cir., 100 F. 2d 929, 308 U. S. 343.

Act of May 19, 1937, 25 U. S. C. A., Section 412a, is as follows:

"All homesteads, *heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress: Provided, That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior: and provided further, That the Indian owner, or owners, shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town, or city property, not exceeding in cost* $5,000, *to be designated as a homestead.*" (Emphasis supplied.)

Under Section 1 of Act of May 27, 1908, (35 Stat. 312), as amended by Act of May 10, 1928 (45 Stat. 495), all *homesteads* of allottees therein named and enrolled as mixed-bloods of three-quarters or more Indian blood, shall not be all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, shall not be subject to alienation, contract to sell, power of attorney, or any other encumbrance prior to April 26, 1931, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceedings for the benefit of the respective Indians as he may prescribe.

[fol. 90] Section 1 of Act of May 10, 1928, amending said Act of May 27, 1908, entitled "An Act to extend the period of restrictions on lands of certain members of the Five Civilized Tribes and for other purposes," is as follows:

". . . That the restrictions against the alienation, lease, mortgage, or other encumbrance of the lands allotted to members of the Five Civilized Tribes in Oklahoma, enrolled as of one-half or more Indian blood, be, and they are hereby, extended for an additional period of twenty-five years commencing on April 26, 1931: PROVIDED: That the Secretary of the Interior shall have the authority to remove the restrictions, upon the applications of the Indian owners of the land, and may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

In case of death of allottees of the Five Civilized Tribes of one-half or more Indian blood leaving full-blood heirs or devisees, Congress provided that no conveyance of their interest in the lands inherited should be valid unless approved by the Court having jurisdiction of the settlement of the estate of the deceased allottee or testator, as provided by Section 9 of Act of Congress of May 27, 1908, and as amended by Section 1 of Act of Congress of April 12, 1926, and further as amended by Section 2 of Act of May 10, 1928 (45 Stat. 495).

Section 9 of Act of Congress of May 27, 1908 (35 Stat. 312) provides as follows:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: PROVIDED, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: PROVIDED FURTHER, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such [fol. 91] deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-six, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-

six, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions."

Section 1 of Act of April 12, 1926, amending Section 9 of Act of May 27, 1908, provides as follows:

"* * * That Section 9 of the Act of May 27, 1908, (Thirty-fifth Statutes at Large, page 312), entitled 'An Act for the Removal of restrictions on part of the lands of allottees of the Five Civilized Tribes, and for other purposes, be, and the same is hereby, amended to read as follows: 'Section 9. The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: PROVIDED, That hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by Section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator: PROVIDED FURTHER, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior for the use and support of such issue, during their life or lives, until April 26, 1931: but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will, free from restrictions: if [fol. 92] this be not done, or in the event the issue hereinabove provided for die before April 26, 1931, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions. *Provided*, That the word 'issue' as used in this section shall be construed to mean child or children."

Under Section 9 of Act of May 27, 1908, as amended by Section 1 of Act of April 12, 1926, except where allottees of the Five Civilized Tribes of one-half or more Indian blood should die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottees remained inalienable unless removal of restrictions was effected by the Secretary of the Interior, for the use and support of such issue

during their life or lives, until April 26, 1931, and after the passage of said act of May 10, 1928, until April 26, 1956.

The power of Congress as to continuing or reimposing restrictions upon the alienation of allotted Indian lands in the Creek Nation has been passed on, (Tiger v. Western Inv. Co., 221 U. S. 286, 31 S. Ct. 578; Brader v. James, 246 U. S. 88, 38 S. Ct. 285), and Section 1 of Act of January 27, 1933, considered in Whitchurch v. Crawford, 10 Cir., 92 F. 2d 249, with reference to the supervision of the Secretary of the Interior, relating to restricted funds and other securities theretofore in custody of Secretary of Interior under original Section 9 of Act of May 27, 1908 "belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled," such Indians declared to be restricted and remain subject to jurisdiction of Secretary of Interior until April 26, 1956.

To said Section 1 is attached a proviso:

"That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds by or for restricted Indians, such lands shall *remain* restricted and *tax-exempt* during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956, unless the restrictions [fol. 93] are removed in the meantime in the manner provided by law." (Emphasis supplied.)

Such inherited (remain) restricted or tax-exempt land necessarily meant lands of such tribe allotted to members of the tribe.

Originally in said Section 1 of Act of May 27, 1908, reference is made to enrolled Indians, and then by the act of January 27, 1933, is included not only enrolled but unenrolled Indians where they acquire by inheritance or devise such land, and if it is originally designated as an allotted homestead, though where such Indian acquired it by inheritance or devise, if such Indian was enrolled or unenrolled as one-half blood of such tribe, then the land so held shall *remain restricted* and tax-exempt, and as to restrictions against alienation conveyances relative thereto to be subject to the approval of the Secretary of the Interior, etc., and the Indians not being required to *live in* Oklahoma, as the reference is made in said Section 1 to supervision of the

Secretary of the Interior relating to funds and other securities theretofore "belonging to and only so long as belonging to Indians of the *Five Civilized Tribes in Oklahoma of one-half or more Indian blood enrolled or unenrolled.*" (Emphasis supplied)

In what is known as the Original Creek Treaty, ratified and confirmed by Congress on March 1, 1901 (c. 676, 31 Stat. 861) Sections 2, 5 and 6, one hundred and sixty (160 acres of allotted land was to be selected by the allottee to include improvements which belonged to him, constituting an allotment, forty (40) acres to be selected and designated as a homestead which "shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years," (as to full bloods by Section 19, Act of April 26, 1906, extended to twenty-five years from that date), "for which he shall have a separate deed" so conditioned as required in Creek treaty.

(Section 10 of said treaty covers townsites.)

Supplemental Creek Treaty was confirmed by Congress on June 30, 1902 (c. 1323, 32 Stat. 500), Section 3 thereof providing that paragraph 2 of section 3 of the agreement ratified by said act of Congress approved March 1, 1901, [fol. 94] should be amended, not changing the effect of the provision in the original treaty as to allotments and homesteads, merely providing detail as to the appraised value, etc.

Section 19 of Act of April 26, 1906 (c. 1876, 34 Stat. 137), entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," reimposed restrictions as to full bloods in the Five Civilized Tribes, and extended same from 21 to 25 years after the approval of said act, and provided that the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior, with the proviso that all lands upon which restrictions are removed shall be subject to taxation, and other lands shall be exempt from taxation as long as the title remains in the original allottee.

The Solicitor of the Department of the Interior, on March 14, 1934, held that:

"Apropos of this is the declaration that 'Where the entire interest in any tract of restricted and tax-exempt land * * * is acquired * * * by restricted Indians, such

lands shall remain restricted, and tax-exempt.' This declaration obviously looks to the future and not to the past and discloses a plain intent on the part of Congress to preserve existing restrictions rather than to reimpose restrictions once removed, or change the form of existing restrictions. These considerations lead to the conclusion that the proviso relates only to lands acquired after date of enactment and not to prior acquisions."

Congressional legislation has had for its purpose especially as to the Five Civilized Tribes to gradually emancipate them from their former status so as to fit them for duties of citizenship and self support and maintenance. The developed responsibility has been indicated. The electorate of the state of Oklahoma for three consecutive terms elected a member of the Five Civilized Tribes to the United States Senate, and two different members of said tribes to the lower house of the Congress of the United States, one consecutively for ten terms and the other for ten terms [fol. 95] with an interim of one term. Four members of said tribes have been elected and re-elected district judge, one of them elevated by the electorate to the Supreme Court of the state and now serving as Chief Justice, and two of the others are still continuing as district judges, and the other holds some responsible appointive position in the Interior Department in Washington. One was elected and served a full term as Secretary of State, and another is entering upon his third consecutive term by election as Clerk of the Supreme Court. Two members of said tribes have been speaker of the House of Representatives of the legislature, and another president pro tempore of the Senate of the legislature, and members of said tribes have on many occasions and repeatedly been elected to the State Senate and the lower house of the legislature, and the county offices, including county judge, have been many times and repeatedly filled by election from members of the Five Civilized Tribes. In the business sphere the Five Civilized Tribes have engaged in banking, merchandising, ranching, law, medicine, and education. Mitchell v. Metcalf & Eddy, *supra;* Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 571.

As to the treaty provisions between the United States and the Five Civilized Tribes, under which the United States Government made contracts with the Indians guaranteeing exemption of taxes, the courts have given a liberal

construction to the treaty to protect the Indians in exercise of such rights as therein guaranteed. But as to legislative matters arising since April 26, 1931, the general rule as to strict construction applies, that is, to follow the manifest wording of the statute and to be determined from the surrounding circumstances and the language or words from which a conclusion reasonably and necessarily follows. Choate v. Trapp, 224 U. S. 65; Blundell v. Wallace, 267 U. S. 372; Cully v. Mitchell, 37 F. 2d 493; Choteau v. Burnett, 283 U. S. 691; Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 571; Metcalf & Eddy v. Mitchell, 269 U. S. 514.

Section 2, Act of June 20, 1936, as amended by Act of May 19, 1937, was not passed in view of matters of the Five Civilized Tribes, but as to other tribes. (6 Fed. Supp. 401, *supra*; 13 Fed. Supp. 641, *supra*; 87 F. 2d 55, *supra*; 100 F. 2d 929, *supra*; 308 U. S. 343, *supra*.)

[fol. 96] Congressional Record, Senate, June 6, 1936, p. 9322, Relief of Indian Lands From Taxation:

"Mr. King: Mr. President, I should like to have an explanation of the bill.

"Mr. Thomas of Oklahoma (Chairman of Committee on Indian Affairs): Mr. President, this bill seeks to accomplish certain purposes * * * Formerly the Congress authorized the Secretary of the Interior to buy land for landless Indians * * *. Some lands were taken from private ownership and assessing authorities proceeded to assess the land for taxes. * * * In some cases tax warrants have been issued and the Indians have been threatened with dispossession. * * * tax warrants and tax assessments should be paid and the title to the lands cleared. The bill authorizes the appropriation of money for that purpose.

"Section 2 (of said act) provides that the lands so secured shall hereafter be nontaxable.

"The President pro tempore. The question is on the third reading and passage of the bill. (No further discussion or question raised.")

"The bill was ordered to a third reading, read the third time, and passed, as follows:" (Said Act of June 20, 1936 follows in the record.) Richbourg Motor Co. v. U. S., 281 U. S. 528; McLean v. U. S. 226 U. S. 374.

The Creeks of the Five Civilized Tribes could not properly be denominated landless Indians. The Congress had

not recently authorized the Secretary of the Interior to purchase lands for them or any of them. As one of the Five Civilized Tribes, lands were allotted to their members by the Government, under the Creek treaty, including all full blood allottees and their heirs and they still own said lands except as restrictions have been removed and such owners permitted to sell same, and that has occurred among the Creeks only in rare and exceptional cases. Under the treaties and facts hereinbefore set forth, such Creek lands, consisting of full blood allotments, have been nontaxable prior to April 26, 1931, and the lands which have been purchased from their restricted funds under the decisions here- [fol. 97] inbefore cited were taxable not only before such purchase where restrictions had ceased, or been removed, and after 25 years from April 26, 1906, which would be April 26, 1931 unless reimposed. Under the said acts of April 12, 1926 and May 10, 1928, Congress continued in applicable cases not only restrictions but also nontaxability not exceeding 160 acres, held by an allottee after April 26, 1931. That would cover the original allotted lands of Wosey John Deere, but a serious question arises as to whether after the tax exemption had expired under the treaty provision and limitation it was in the power of Congress to extend the exemption as to taxation. It is not essential here to determine that question in order to dispose of this case.

The land acquired by inheritance by a full blood under such conditions as it would be restricted after April 26, 1931, as well as the lands purchased under the supervision of the Secretary of the Interior with restricted funds, such land under such a state of facts could be considered as restricted by reimposition, but not to be exempt from taxation either as to such allottee or unenrolled full blood born after March 4, 1906.

Section 2 of said act of June 20, 1936, as amended by act of May 19, 1937, is not applicable to the lands here involved.

The word "homestead" as used in this statute, if intended to apply to the Five Civilized Tribes whose members were citizens of Oklahoma and also of the United States, would have contemplated a homestead as defined by state law.

Section 1, Article 12, Constitution of Oklahoma, provides that:

"The homestead of any family in this State, not within any city, town or village, shall consist of not more than one hundred and sixty acres of land, which may be in one or more parcels, to be selected by the owner. The homestead within any city, town, or village, owned and occupied as a residence only, shall consist of not exceeding one acre of land, to be selected by the owner: Provided, That the same shall not exceed in value the sum of five thousand [fol. 98] dollars, and in no event shall the homestead be reduced to less than one-quarter of an acre, without regard to value; And Provided Further, That in case said homestead is used for both residence and business purposes, the homestead interests therein shall not exceed in value the sum of five thousand dollars: Provided, That nothing in the laws of the United States, or any treaties with the Indian Tribes in the State, shall deprive any Indian or other allottee of the benefit of the homestead and exemption laws of the State: And Provided Further, That any temporary renting of the homestead shall not change the character of the same when no other homestead has been acquired."

Section 34, Title 68, Okla. Stat. Anno. (Okla. Stat. 1941, Section 34, Title 68), provides:

"Homesteads, as defined in Section 1 hereof, are hereby classified for the purpose of taxation as provided in Section 22, Article 10 of, and subsequent amendments to, the Constitution of the State of Oklahoma; and all homesteads in this State shall be assessed for taxation the same as other real property therein, except that each homestead, as defined in this Act, shall be exempted from all forms of ad valorem taxation to the extent of one thousand ($1,000.00) dollars of the assessed valuation thereof, as hereinafter provided, except that all assessments, levies, encumbrances, and other contract obligations incurred or made prior to the taking effect of this Act, shall in no way be affected or impaired by this Act. Laws 1936, Ex. Sess., p. 52, Section 2."

Section 33 thereof provides:

"The term 'homestead', as used in this Act, shall mean and include the actual residence of a natural person who is a citizen of the State of Oklahoma, provided the record

actual ownership of such residence be vested in such natural person residing and domiciled thereon. The surviving spouse and minor children of a deceased person shall be considered record owners of the homestead where the title is in the name of the deceased, but in all other cases the [fol. 99] deed or other evidence of ownership must be of record in the office of County Clerk on January 1st in order for any person to be the record actual owner. A rural homestead shall not include more than One Hundred Sixty (160) acres of land and the improvement thereon; and an urban homestead shall not include any land except the lot or lots, or the unplatted tract, upon which are located the dwelling, garage, barn and/or other outbuildings necessary or convenient for family use.

"Provided, that no building which is used in whole, or in part, for commercial purposes shall be deemed a homestead under the provisions of this Act; and

"Provided further, that the keeping of boarders or roomers by citizens in a building maintained otherwise exclusively as a home shall not be considered as commercial purposes as contemplated by this Act.

"The term 'rural homestead' as used herein shall mean and include any homestead located outside a city or town or platted subdivision or addition.

"The term 'urban homestead' as used herein shall mean and include any homestead located within any city or town whether incorporated or unincorporated, or located within any platted subdivision or addition, whether such subdivision or addition be a part of a city or town or a part of a township; provided further, that in no case shall an urban homestead exceed in area one (1) acre. Laws 1936, Ex. Sess., p. 52, Section 1; Laws 1939, p. 405, Section 1."

In the deed executed by Wosey John, now Deere, on December 10, 1937, is conveyed to the appellees "all of the life estate heretofore reserved in the following described property described in deed executed by her on March 4, 1931", described as follows:

W½ SW¼ of Section 27, Twp. 18N, Range 11E; W½ NW¼ SW¼ SW¼ and W½ E½ NW¼ SW¼ SW¼ of Section 36, Twp. 18N, Range 11E, also the center 50 feet of lot 6 and the center 50 feet of the south 33.4 feet of lot 3, all in Block 39, of the original town of Sapulpa,

"together with all the improvements thereon, and the ap-
[fol. 100] purtenances thereunto belonging * * *. To have and to hold said described premises unto said grantees, their heirs, and assigns, forever, free, clear, and discharged of all former grants, charges, taxes, judgments, mortgages, and other liens and encumbrances of whatsoever nature, subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto shall be of any force and effect, unless approved by the Secretary of the Interior or the restrictions from said land are otherwise removed by operation of law," substantially identical with the clause contained in Exhibit D, deed executed by her to appellees dated March 4, 1931.

Section 69, Title 60, Okla. Stat. Anno., p. 250, (Section 69, Title 60, 1941 Stat.) provides:

"The owner of a life estate must keep the buildings and fences in repair from ordinary waste, and must pay the taxes and other annual charges, and a just proportion of extraordinary assessments benefiting the whole inheritance."

Under deed of December 10, 1937, when properly approved by the Interior Department, the complete title vested in the appellees, and the question may arise as to her liability under the warranty therein for any encumbrances remaining thereon for taxes, though such warranty was executed as a pure gift. Claim of the appellees against the mother or the estate of the mother, according to the record, has not been set up, but such claim for exemption of the land from state taxation until Congress otherwise provides was presented, not by virtue of a mandatory provision of the Creek treaty, and thereby with a guaranty on part of the United States Government. If appellees prevail it must be by strict construction in application of the facts under act of June 20, 1936, Section 2, providing "lands heretofore purchased out of trust funds or restricted funds of the said Indian are hereby declared to be instrumentalities of the federal government and shall be nontaxable until otherwise directed by Congress."

The lands described in Exhibits A, B, and C *were not heretofore purchased by the trust or restricted funds of*

appellees for appellees, but out of such funds of Wosey John [fol. 101] *Deere, by and for her,* and the eighty-acre tract as a ~~home for her, not as~~ an original homestead but for a home for her. She already had an allotment homestead, burdened with the production of oil, with tax exemption, and it may be assumed that it was not suitable for a home on account of oil production, as it was purchased for a home for her. All lands described in said deeds, none being part in any way of her allotment, were purchased by and for her and not for any one else.

Section 2 of Act of June 20, 1936, as amended by Act of May 19, 1937, provided that "*all homesteads heretofore purchased out of trust or restricted funds of individual Indians are hereby declared to be instrumentalities of the Federal Government and shall not be taxable until otherwise directed by Congress,* (emphasis supplied) Provided, That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior; And provided further, That the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town, or city property, not exceeding in cost $5000.00, to be designated *as a homestead.*". (Emphasis supplied)

The lands described in Exhibits A, B and C were not purchased with restricted trust funds of appellees, but from restricted funds of the mother, and the mother having on March 4, 1931 conveyed said restricted lands to said appellees retaining "all the rents and profits to be derived from all of the above property as long as she lives, that is, grantor retains a life estate in all of the real estate described in this deed, together with all the improvements thereon and such appurtenances thereunto belonging, and warrant the title to the same" and subsequently on, and after May 19, 1937, December 10, 1937 had conveyed all of her life estate theretofore reserved by her in all of said lands together with all improvements thereon and the appurtenances thereunto belonging and warrant the title to the same," then the appellees were not justified under the facts of the record and of which we take judicial knowledge and the law to designate that 87½ acres, all of it except the [fol. 102] town lots, *as a homestead* jointly for appellees, not having theretofore been purchased out of restricted

funds of said appellees, then to say in order to place that property in favor of these three unenrolled full blood Indians—not enrolled members of the Creek tribe—in a status as being immune from taxation until Congress shall otherwise provide, that said Section 69, Title 60, Okla. Stat. Anno., *supra*, requiring the holder of a life estate "to keep the buildings and fences in repair from ordinary waste, and to pay the taxes and other annual charges, and a just proportion of extraordinary assessments benefiting the whole inheritance," when her estate would be liable for a breach of that statutory provision though their claim would be without any actual consideration other than love and affection for the warranty, that immunity from taxation cannot be sustained on the question of relation.

In Nos. 2558, 2559, 2560, United States v. Oklahoma Tax Commission, pending in the Circuit Court of Appeals for the Tenth Circuit, this court takes judicial knowledge of contents of records in said cases, and inheritance or transfer or excise tax as provided by the Oklahoma statute as therein disclosed to be claimed, involves $359,643 of unrestricted funds in custody of Secretary of Interior from estate of Wosey John Deere, full blood Creek woman killed in an automobile accident September 2, 1938, on which the Oklahoma State Tax Commission recovered such excise tax thereon in sum of $14,908 under judgment of the United States District Court for the Eastern District of Oklahoma, which the United States, as appellant, seeks in this court in said cases to have vacated on review.

Under application of the plea of relation, immunity from taxation may not be allowed. Such relation does not arise except on account of a consideration therefor, or an equity would have to exist on the part of appellees, which is not shown here. Godfrey v. Iowa Land & Trust Co., 24 Okl. 293, 95 Pac. 797; Stark v. Stark, 6 Wall., 18 L. Ed. 925; Jones v. Meehan, 175 U. S. 4, 20 S. Ct. 2, 44 L. Ed. 51; Wallace v. Adams, 204 U. S. 419, 27 S. Ct. 363, 51 L. Ed. 547.

The land restricted in the mother out of pure love and affection was by her donated to the appellees.

[fol. 103] This court takes judicial knowledge of the fact that the inherited restricted estate of Wosey John Deere in the custody of the Secretary of the Interior on September 2, 1938 amounted to $359,643 and the record shows that these appellees were her heirs, and to say that appellees are

not required to present a claim for that and collect same, but on the doctrine of relation that they shall have a right to be released from state taxes thereon until Congress otherwise provides in effect results in violating the Tenth Amendment to the Constitution of the United States.

The date of the judgment is July 17, 1941, from which this appeal is prosecuted. Neither the United States nor the Secretary of the Interior nor any governmental agency was a party thereto either in the trial or appellate court nor has any appearance in any respect been herein made. An individual action brought by allottees or members of the Five Civilized Tribes with no appearance in any way whatever on the part of the United States, the statute of limitations and mandatory preliminary requirements as to state procedure applies. In Broadwell v. Board of Commissioners of Bryan County, 88 Okl. 147, 211 Pac. 1040, cert. den. 262 U. S. 750, 43 S. Ct. 525, 67 L. Ed. 214, it was held that the statute of limitations in such a case constituted a bar to the parties thereto. See also, Ward v. Board of County Comm'rs., 253 U. S. 17; Carter v. Collins, 174 Okl. 4; Antrim v. Sneed, 175 Okl. 47, 52 P. 2d 1040. As to an action thereafter brought by the United States for the use or benefit of any such party neither the statute of limitations nor said preliminary state statutory procedure applied. Board of Commissioners of Bryan County v. United States, 10 Cir., 123 F. 2d 782, cert. den. — U. S. —.

Act of June 11, 1940 and of February 10, 1942, provided for reimbursement to Indian allottees or Indian heirs or Indian devisees of allottees for taxes paid including interest paid on so much of their restricted allotted lands as may have been patented in fee and restrictions not to expire prior to the expiration of the twenty-five year period of trust, and that does not apply to any lands of the members of the Five Civilized Tribes but to Indians that received allotments and patents under the General Allotment [fol. 104] Act of February 8, 1887 (24 Stat. 391), in cases in which a claim against a state, county or political subdivision for taxes collected upon such land during the trust period, which was the twenty-five year trust period, later extended, under the allotments made under said act of February 8, 1887.

No trust restricted funds of appellees or either of them were invested in said realty as to which the taxes were here involved. The eighty acres included in Exhibit C was

purchased by the Secretary of the Interior as a home for the mother out of her restricted funds described in the conveyance with a warranty by Wosey John, now Deere, on March 4, 1931 to appellees jointly, retaining in herself a life estate including therefrom proceeds from rents and profits. If it was her statutory duty to pay the lawful taxes thereon her estate was amply able to meet such liability. Appellees must bring themselves within the express terms of the statute and within a strict construction thereof as no other reasonable conclusion can be reached therefrom sustaining such right on their part, and the application of the doctrine of relation in Indian matters is not justified by this record.

Evelyn Seber, otherwise designated as Osharsha John, Jimmie Powshick and Juanita Deere, now McIntosh, all born to said Wosey John Deere after March 4, 1906, and unenrolled, are her heirs and by inheritance participate in all of her estate including her allotted realty consisting of of forty-acre original homestead and the additional part of said original allotment, all restricted, and also her restricted inherited allotted Creek lands, including restricted royalties and restricted funds, from all of her land, all held by the Secretary of the Interior as such restricted funds and realty for her benefit at and prior to September 2, 1938, the date of her death occasioned by an automobile accident, and said three unenrolled full blood heirs participate by inheritance therein and after September 2, 1938 the Secretary holds in trust their respective inheritance, which may rest under another status. Landman, Supt., v. Comm'r. of Internal Revenue, 10 Cir., 123 F. 2d 787.

The applicability of federal instrumentalities constituting estate tax immunity is to be applied only by a strict construction. Under the Farm Security Administration, money [fol. 105] is made available by loan from federal funds to acquire non-urban homes and also vast sums of money have been advanced under the Federal Housing Administration as to urban homes. Under the Farm Security Administration money has been furnished to members of the Five Civilized Tribes, whose restrictions expired by operation of law, and their allotments had been lost, and as to persons who had received free homes or homesteads in what was formerly known as Oklahoma Territory, and had been lost, to acquire homes upon which these Government agencies hold liens for these vast advancements or guaranties, and

the occasion may arise when Congress, supported by public sentiment, will pass a like act for relief as to such holders of non-urban homes as well as urban homes, providing that same will be immune from state taxation, denominating same as a federal instrumentality. Then the question would arise as to whether that was an extension of the ruling in this case. A strict construction should here be followed.

By Joint Resolution, Congress extended the tribal existence and government of the Five Civilized Tribes of Indians in the Indian Territory (S. J. Res. 37, March 2, 1906, 34 Stat. 822; Laws Relating to the Five Civilized Tribes in Oklahoma [1890-1914], p. 524), as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Tribes or Nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws *until all property of such tribes, or the proceeds thereof*, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law." (Emphasis supplied.)

Later in act of April 26, 1906, 34 Stat. 137, the last Section (28) of said Act, other than repealing part, is as follows:

"That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until [fol. 106] otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year; Provided, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: Provided further, that no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States."

Reference has been made herein to the fact that this suit has been brought by the appellees, three non-enrolled but full United States and state citizens—full blood Creek Indians—without the United States Government in any way appearing, and that under such facts the statute of limitations and mandatory preliminary procedure apply.

In Helvering Mountain Producers Corp., 303 U S. 376, 58 S. Ct. 623, it is stated:

"The power to tax should not be crippled by extending the Constitutional exemption from taxation to those subjects which fall within the general application of nondiscriminatory laws, and where no direct burden is laid upon the governmental instrumentality and there is only remote, if any, influence upon the exercises of the functions of government."

Under the *state* homestead exemption statute, every homestead as therein defined is in effect exempt from taxation up to the assessed value of $1,000 and where it exceeds that it is only taxable for the assessed sum in excess of an assessed $1,000.

These appellees under this record are not entitled to tax exemption on the 87½ acres land designated as a *homestead* for the three appellees under act of Congress, but may when facts justify have assistance or credit under the state act hereinbefore set out.

In the conclusion of the majority opinion insofar as the [fol. 107] judgment of the trial court grants a recovery for the taxes and penalties for the taxable year beginning July 1, 1936, was erroneous, to that extent I concur, and also in the conclusion that allowance of interest on the taxes paid should not be permitted, but I further conclude the judgment of the trial court in toto should also be reversed and remanded.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—September 2, 1942.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Oklahoma and was argued by counsel.

In consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby modified insofar as the judgment of the trial court grants a recovery for the taxes and penalties for the taxable year beginning July 1, 1936, and insofar as the judgment of the trial court makes an allowance of interest on the taxes paid which are held to be illegal and void, and, as so modified, affirmed; and that Evelyn Seber, otherwise known as Osharsha John et al., appellees, have and recover of and from Board of County Commissioners of the County of Creek, State of Oklahoma, a municipal corporation, et al., appellants, their costs herein.

On October 8, 1942, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.

[fol. 108] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 109] SUPREME COURT OF THE UNITED STATES, No. 556, OCTOBER TERM, 1942

ORDER ALLOWING CERTIORARI—Filed January 11, 1943.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Mac Q. Williamson, File No. 47,057, U. S. Circuit Court of Appeals, Tenth Circuit, Term No. 556, Board of County Commissioners of the County of Creek, State of Oklahoma, a Municipal Corporation, et al. Petitioners vs. Evelyn Seber, et al., Petition for a writ of certiorari and exhibit thereto. Filed November 30, 1942. Term No. 556 O. T. 1942.

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In The
Supreme Court of the United States
TERM, 1942

No. 556

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, a Municipal Corporation, ET AL.,

Petitioners,

vs.

EVELYN SEBER ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT

MAC Q. WILLIAMSON,
Attorney General of the State of Oklahoma;

HOUSTON E. HILL,
Assistant Attorney General;

NORMAN J. FUTOR,
Assistant Attorney General;

EVERETT S. COLLINS,
County Attorney,
Creek County, Oklahoma.

Counsel for Petitioners.

November, 1942.

KING LAW BRIEF CO., INC., OKLAHOMA CITY—20 S. WALKER—PHONE 9-2999

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1. The Acts apply only to a "landless" Indian who had never held land prior to the purchase of property for him out of restricted funds: said Acts have no application to an Indian such as Wosey John Deere who was at all times possessed of a Creek allotment and who died on September 2, 1938, possessed of property valued at valued at $359,643 (see minority opinion) 19

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In The
Supreme Court of the United States.

TERM, 1942

No.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, a Municipal Corporation, ET AL.,

Petitioners,

VS.

EVELYN SEBER ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI REQUIRING THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVIEW AND DETERMINATION, THE CASE OF BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS, VS. EVELYN SEBER ET AL., APPELLEES, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States.

Your petitioners respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is an action in which the Circuit Court below (with dissenting opinion) permitted respondents to recover ad valorem taxes paid for the years 1937, 1938, 1939 and 1940 on the following described land in Creek County, Oklahoma:

> W½ of SW¼ of Sec. 27—18 N—11 E; W½ of NW¼ of SW¼ of SW¼, and W½ of E½ of NW¼ of SW¼ of SW¼ of Sec. 36—18 N—11 E, containing 87½ acres (130 Fed. [2d] 666).

The majority opinion of the Circuit Court also upheld a declaratory judgment decreeing the land tax exempt. Although certain additional land was originally involved in the action, the above described land is all that need be considered for the purposes of this petition.

Respondents, as tenants in common, are the owners of said land, having acquired fee simple title thereto by gift on December 10, 1937. On December 16, 1937, respondents designated said land as homestead, under Act of Congress of May 19, 1937. Although respondents happen to be possessed of full Indian blood, they are not enrolled as members of any Indian tribe. Petitioners are public officials of Creek County, Oklahoma.

Respondents' grantor was their mother, Wosey John Deere. She was enrolled opposite Roll No. 9546 of the Creek Tribal Roll. Said land had been purchased for her prior to 1927 out of her restricted funds in the custody of the Secretary of the Interior. Wosey John Deere reserved an interest (life estate) in said land in a conveyance made to respondents on March 4, 1931, but she conveyed said reserved interest to respondents on December 10, 1937. At all times material herein, Wosey John Deere was possessed of a homestead which had been alloted to her by virtue of her tribal enrollment. As was said in the minority opinion (130 Fed. [2d] 682, 683):

> "The Creeks * * * could not properly be denominated landless Indians * * * Lands were allotted to their members * * *. Under * * * acts of April 12, 1926, and May 10, 1928, Congress continued in applicable cases not only restrictions, but also non-taxability not exceeding 160 acres, held by an allottee after April 26, 1931. That would cover the original allotted lands of Wosey John Deere * * *."

Respondents inherited $359.643 from said grantor, Wosey John Deere, who died on September 2, 1938. On the basis of cases numbered 2558, 2559, 2560, pending in the Circuit Court of Appeals, styled United States v. Oklahoma Tax Commission, the minority opinion of the Circuit Court said (130 Fed. [2d] 685):

> "The court takes judicial knowledge of the fact that the inherited restricted estate of Wosey John Deere in the custody of the Secretary of Interior on September 2, 1938, amounted to $359.643, and the record shows that these appellants were her heirs * * *."

The majority opinion of the Circuit Court was based upon the following Congressional Acts:

Act of Congress of June 20, 1936 (49 Stat. L. 1542):

"Sec. 1. * * * There is hereby authorized to be appropriated * * * the sum of $25,000, to be expended * * * for the payment of taxes * * * assessed against individually owned Indian land, the title to which is held subject to restrictions against alienation or encumbrance * * * heretofore purchased out of trust or restricted funds of an Indian, where the Secretary [of Interior] finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase it would be non-taxable * * *.

"Sec. 2. All lands, the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be non-taxable until otherwise directed by Congress" (49 Stat. L. 1542).

Amendatory Act of Congress of May 19, 1937 (50 Stat. L. 188), 25 U. S. C. A., Sec. 412a (amending Sec. 2 above to read as follows):

"Sec. 2. All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be non-taxable until otherwise directed by Congress: Provided, That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior; and, provided further, that the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or

the village, town or city property, not exceeding in cost $5000.00, to be designated as a homestead."

The majority opinion said (130 Fed. [2d] 670):

"The taxable status of all property in Oklahoma is fixed as of January first of each year * * *."

The Act of June 20, 1936, was in force on January 1, 1937, and it was under that Act that the majority opinion permitted recovery of 1937 ad valorem tax.

The Act of May 19, 1937, was in force on January 1, 1938, and respondents had designated the land as homestead on December 16, 1937, and it was under that Act that the majority opinion permitted recovery of 1938, 1939 and 1940 ad valorem tax.

This action involved no disputed questions of fact. (See Agreed Statement of Fact, T. 41-50).

II.

STATEMENT OF POINTS RELIED ON BY PETITIONERS

1. Act of Congress of June 20, 1936, and Act of Congress of May 19, 1937, are unconstitutional because the Congress of the United States cannot, for purposes of exemption from state taxation, create a "Federal instrumentality" out of the person or property of an individual merely because such individual is possessed of a quantum of Indian blood.

2. Act of Congress of June 20, 1936, and Act of Congress of May 19, 1937, are not applicable to the land here involved.

(a) The Acts apply only to a "landless" Indian who had never held land prior to the purchase of property for him out of restricted funds; said Acts have no application to an Indian such as Wosey John Deere, who was at all times possessed of a Creek allotment and who died on September 2, 1938, possessed of property valued at $359,643.

(b) The Act of June 20, 1936, limited tax exemption to "* * * lands, the TITLE to which is now held by an Indian * * *, heretofore purchased out of trust or restricted funds of SAID Indian," and the Act of May 19, 1937, limited the tax exemption to HOMESTEAD lands. Since the land in question was purchased out of the funds of respondents' grantor rather than the funds of respondents, respondents cannot claim tax exemption.

III.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. Congress has no power to grant exemption from state taxation to individuals without tribal status merely because they happen to have a quantum of Indian blood. The Commerce clause of the Constitution (Art. 1, Sec. 8) merely gives Congress the power "To regulate Commerce with foreign nations and among the several states, *and with the Indian Tribes* * * *." When a circuit court upholds legislation which constitutes so grave an interference with the taxing power of a state, then the Supreme Court of the United States should take jurisdiction in order to correct the abuse.

2. The Congress and the Federal courts have no doubt been influenced by *obiter dictum* of the Supreme

Court in passing on questions arising out of treaty obligations. The Congress and the Federal courts have also been influenced by the language used in a certain line of cases which was overruled by *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 58 S. Ct. 623, 82 L. ed. 907. The Supreme Court of the United States should take jurisdiction here in order to settle the confusion that seems to obtain in so many high quarters.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue to the Circuit Court of Appeals for the Tenth Circuit, charging said court to certify and send to this Court a full and complete transcript of the record and all proceedings of said Circuit Court had in the case numbered and entitled on its docket, No. 2488, Board of County Commissioners of the County of Creek, State of Oklahoma, a municipal corporation, et al., appellants, v. Evelyn Seber et al., appellees, to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said United States Circuit Court of Appeals be reversed by the Court, and for such relief as to this Court may seem proper.

Copies of the transcript of record in this case in the Circuit Court of Appeals for the Tenth Circuit are filed herewith in conformity with Rule No. 38 of this Honorable Court.

MAC Q. WILLIAMSON,
Attorney General of the
State of Oklahoma;

HOUSTON E. HILL,
Assistant Attorney General;

NORMAN J. FUTOR,
Assistant Attorney General;

EVERETT S. COLLINS,
County Attorney,
Creek County, Oklahoma,

Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINION OF THE COURT BELOW

This petition prays for a review of the judgment entered in case No. 2488 in the Circuit Court of Appeals for the Tenth Circuit, on September 2, 1942 (T. 107). A majority opinion (130 Fed. [2d] 663; T. 61), and a minority opinion (130 Fed. [2d] 671; T. 72), were written. No petition for rehearing was filed.

II.

JURISDICTION

1. The ground on which the jurisdiction of this Court is invoked is Judicial Code 240, as amended by Act of February 13, 1925, c. 229, Sec. 1 (43 Stat. 938), 28 U. S. C. A. 347, providing for the issuance of writs of certiorari by the Supreme Court of the United States to review judgments of the Circuit Court of Appeals.

2. The facts in this case as stipulated show that the nature of the case and of the rulings below were such as to bring the case within the scope of the provision relied on. (See Agreed Statement of Fact, T. 41-50).

3. This case is of the utmost gravity to the State of Oklahoma. It involves the constitutionality of the Act of Congress of June 20, 1936 (49 Stat. L. 1542), and

the amendatory Act of May 19, 1937 (50 Stat. L. 188, 25 U. S. C. A., Sec. 412a). Under the holding of the Circuit Court below the solvency of a large number of counties and school districts within the State of Oklahoma is threatened. Although Oklahoma, with two-thirds of the Indian population of the United States, is the State most seriously affected, many other states have also been prejudiced.

III.

STATEMENT OF THE CASE

The nature of the case and the ruling of the Circuit Court of Appeals for the Tenth Circuit have already been set forth in the foregoing petition which is adopted as a part of this brief.

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that the Acts of Congress in question are constitutional.

2. The Circuit Court of Appeals erred in holding that the Acts of Congress in question are applicable to the land here involved.

a. The court erred in holding that Wosey John Deere (who possessed a Creek allotment at the time the land in question was purchased for her, and whose property was valued at $359,643) was in the category of persons entitled to receive the benefits of Act of Congress of June 20, 1936 (49 Stat. L. 1542).

b. The court erred in holding that respondents (who were possessed of full Indian blood, but were

not enrolled in any Indian tribe or possessed of any restricted funds) and who acquired the land in question by gift, were in the category of persons entitled to receive the benefits of Act of Congress of June 20, 1936 (49 Stat. L. 1542), as amended by Act of Congress of May 19, 1937 (50 Stat. L. 188, 25 U. S. C. A., Sec. 412a).

3. The Circuit Court of Appeals erred in holding that—because Wosey John Deere owned an interest in the land in question on January 1, 1937—respondents were entitled to recover ad valorem taxes paid on said land for the year 1937, even though neither Wosey John Deere nor the administrator of her estate were parties to this action.

4. The Circuit Court of Appeals erred in permitting respondents to recover ad valorem taxes which had been paid on the land in question more than three years before the filing of this action, such action being barred by the statute of limitations of the State of Oklahoma.

5. The Circuit Court of Appeals erred in upholding Federal jurisdiction in this action, in view of Section 12665, O. S. 1931, which has the effect of requiring that actions for the recovery of illegally collected taxes shall be filed in the courts of the State of Oklahoma rather than the Federal courts.

V.

ARGUMENT

SUMMARY OF ARGUMENT

1. Act of Congress of June 20, 1936, and Act of Congress of May 19, 1937, are unconstitutional because

the Congress of the United States cannot, for purposes of exemption from state taxation, create a "Federal instrumentality" out of the person or property of an individual merely because such individual is possessed of a quantum of Indian blood.

2. Act of Congress of June 20, 1936, and Act of Congress of May 19, 1937, are not applicable to the land here involved:

(a) The Acts apply only to a "landless" Indian who had never held land prior to the purchase of property for him out of restricted funds; said Acts have no application to an Indian such as Wosey John Deere who was at all times possessed of a Creek allotment and who died on September 2, 1938, possessed of property valued at $359,643.

(b) The Act of June 20, 1936, limited tax exemption to "* * * lands, the TITLE to which is now held by an Indian * * *, heretofore purchased out of trust or restricted funds of SAID Indian," and the Act of May 19, 1937, limited the tax exemption to HOMESTEAD lands. Since the land in question was purchased out of the funds of respondents' grantor rather than the funds of respondents, respondents cannot claim tax exemption.

ARGUMENT IN CHIEF

PROPOSITION I.

The Acts of Congress in question are unconstitutional because the Congress of the United States cannot, for purposes of exemption from state taxation, create a "Federal instrumentality" out of the person or property of an individual merely because such individual is possessed of a quantum of Indian blood.

The majority opinion of the Circuit Court purports to dispose of the constitutional question in the following language (130 Fed. [2d] 670):

> "The exemption granted here is based upon the power of the Federal Government to create a Federal instrumentality out of lands heretofore taxable by the State of Oklahoma, and to immunize them against taxation."

The above statement was made by the court without citation of authority. More serious is the fact that the above statement begs the question. Of course, the Federal Government can—in pursuance of a bona fide constitutional purpose—create a Federal instrumentality, immune from state taxation. But it is the position of the State of Oklahoma that *the Federal Government cannot, for purposes of exemption from state taxation, create a "Federal instrumentality" out of the person or property of an individual merely because such individual is possessed of a quantum of Indian blood.*

There is dictum in the case of *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, 72 L. ed. 709, which may appear to support the majority opinion of the Circuit Court. The following unfortunate language was used in that case:

> "The construction to be placed on these decisions is that the lands now in question, and hence the interest of the lessee in them are not such instrumentalities of the government as will be declared immune from taxation *in the absence of an express exemption by congress* * * *."

But since when has Congress ever had the power to confer immunity from taxation on a person by turning him into a Federal instrumentality, even though some Indian blood be involved? Whence came this Circe-like power? The commerce clause of the Constitution (Art. 1, Sec. 8), provides that Congress shall have power "to regulate commerce with foreign nations and among the several states, *and with the Indian Tribes* * * *." This is a far cry from granting exemption from state taxation to individuals without tribal status who happen to have a quantum of Indian blood.

On principle, the use of the concept "Federal instrumentality" in connection with individuals possessed of some Indian blood, constitutes an abuse no less serious than the use of the concept of "freedom of contract" in connection with certain regulatory measures. Neither of these two concepts are to be found in the Constitution. Both may, on occasion serve a useful purpose. The Supreme Court, as now constituted, has recognized that "freedom of contract" has too often been used to arrive at decisions which could not be sustained by the language of the Constitution or the logic of events. The phrase "freedom of contract" has lost its place in the abracadabra of constitutional ritual, and societal control is no longer to be confined by such an incantation. Now let the jargon of legalistic conjuration be further delimited by stripping the "instrumentality" gloss from the simple constitutional reference to Indian tribes.

Helvering v. *Mountain Producers Corp.*, 303 U. S. 376, 58 S. Ct. 623, 82 L. ed. 907, has pointed the way to rectification of the boundaries of tax exemption on lands affected by Indian rights. It has an indirect bearing on the present validity of the dictum in *Shaw* v. *Gibson-Zahniser Oil Corp.*, *supra*, to which reference has been made.

In *Shaw* v. *Gibson-Zahniser Oil Corp.*, *supra*, the Court said:

> "* * * Neither leases of * * * [restricted allotted or tribal] lands, Indian Territory Illuminating Oil Co. v. Oklahoma * * *, nor the exploitation of the land by the lessee, Howard v. Gypsy Oil Co. * * *, Large Oil Co. v. Howard * * *, Choctaw O. & G. R. Co. v. Harrison * * *, Jaybird Min. Co. v. Weir * * *, nor his income from the lease * * *, may be taxed by the state."

But in *Helvering* v. *Mountain Producers Corp.*, *supra*, the Court said:

> "We are convinced that the rulings in Gillespie v. Oklahoma * * *, and Burnet v. Coronado Oil & Gas Co., are out of harmony with correct principle and accordingly they should be, and they now are, overruled."

And further:

> "We have always recognized that no constitutional implications prohibit a non-discriminatory tax upon the property of an agent of the government merely because it is the property of such an agent and used in the conduct of the agent's operations and necessary for the agency."

And here is a point to be stressed: To hold, in *Helvering* v. *Mountain Producers Corp.*, *supra*, that certain

cases were "out of harmony with correct principle," necessitated an outright overruling of those cases; but to hold that a certain dictum in *Shaw* v. *Gibson-Zahniser*, *supra*, is "out of harmony with correct principle," requires nothing so drastic. This is the very first time that this Court has had occasion to pass upon the power of Congress to render lands exempt from state taxation where tribal rights are not involved. The cases sustaining tax exemption have dealt with lands *allotted* to individuals out of *tribal* holdings, and those lands were exempt from taxation under treaties executed between the Indian tribes and the United States before Oklahoma acquired statehood. Naturally, Oklahoma entered upon statehood subject to vested treaty rights.

But questions of tribal lands and treaty rights do not arise in the case at bar. The landowner respondents are not enrolled in any Indian tribe. The mere fact that they are of Indian blood does not place them in any special constitutional category. The lands in question were taxable in the hands of their grantor's predecessor in title. The lands were purchased for their grantor out of her restricted Indian funds, not out of any funds belonging to them. To refer to these landowner respondents as "Federal instrumentalities" is certainly the *reductio ad absurdum* of the "instrumentality" concept.

The majority opinion of the Circuit Court has stressed provisions in the Enabling Act and the Oklahoma Constitution which relate to Indian property rights and the authority of the United States to regulate such rights. Such provisions have no application here. They are to be read in the light of the conditions obtaining at the time of the admission of the State of Oklahoma into the Union.

At the time of the admission, a considerable amount of land within the boundaries of Oklahoma was subject to tax exemption by virtue of treaties made by the United States with Indian tribes. Naturally, the United States had no right to violate its treaty obligations. The United States had no right to make any agreement with Oklahoma that would impair those treaty obligations. Oklahoma knew what those treaty obligations were, and assumed the status of statehood with full knowledge of their provisions. Thus Oklahoma entered upon statehood subject to certain tax exemptions, the extent of which was clearly defined and well known to the Indians, the United States and Oklahoma. It was tax exemption of this character which has been many times upheld by the Supreme Court of the United States. *Choate* v. *Trapp*, 224 U. S. 665.

It must be emphasized that the tax exemption, under consideration at the time of the Enabling Act and the Oklahoma Constitution, attached to certain definite and specific tribal lands. The fact that the ownership of such

tribal lands was, at that time, in process of passing from ownership in common to ownership in severalty, is not material, because the change in character of ownership could not extend the boundaries of the tax exempt land beyond the limits which had been agreed upon by the United States, Oklahoma and the Indians.

A specific tax exemption on specific lands, originally tribal in character, was the only type of tax exemption ever considered. It was the only type of tax exemption that could possibly be valid. It is important that this issue not be confused with the power of the United States to impose RESTRICTIONS on its Indian wards. The power of the United States to make judgments as to the degree of competence possessed by individual Indians cannot be challenged by a state. That is a matter between the United States and the individual Indian. That power is not dependent upon any acquiescence by a state in its Enabling Act or its Constitution; no state in the Union can escape its exercise. Oklahoma's situation in that respect is not inferior to the situation of any other state.

Never has the Supreme Court of the United States held that PURCHASED lands, other than those of a tribal character, could be rendered tax exempt by mere fiat of Congress, simply because they were OWNED by an individual Indian, or because restricted funds of an Indian grantor were used in their purchase.

PROPOSITION II.

The Act of Congress of June 20, 1936 (which deals with lands purchased out of an individual Indian's own restricted funds), and the Act of Congress of May 19, 1937 (which amends said 1936 Act by limiting it to homesteads), are not applicable to the lands here involved.

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1. The Acts apply only to a "landless" Indian who had never held land prior to the purchase of property for him out of restricted funds; said Acts have no application to an Indian such as Wosey John Deere who was at all times possessed of a Creek allotment and who died on September 2, 1938, possessed of property valued at $359,643 (see minority opinion).

Because of the fact that so large a proportion of the Oklahoma Indians have been the beneficiaries of allotted lands, there has been a tendency to overlook the fact that large numbers of American Indians were not included in the treaties made by the United States with Indian tribes relative to land distribution.

On behalf of certain American Indians who were "landless," a program of land purchase was entered upon some years ago. The Acts in question relate to that program. When the Act of June 20, 1936, was considered on the floor of the Senate, Senator Elmer Thomas referred to the program as follows:

> "* * * The Congress authorized the Secretary of the Interior to buy land for landless Indians. The Secretary proceeded to buy the lands and assigned the Indians to reside upon such lands" (Congressional Record for the Senate for June 6, 1936, page 9159).

However, the program ran into difficulties. Apparently, those in charge of it failed to make clear to the Indians the fact that the privilege of land ownership carried burdens such as taxes. Senator Thomas described the situation as follows:

> "The recommendation or assertion was made to the Indians that the land would be theirs and they would have no taxes to pay * * *. In some cases tax warrants have been issued and the Indians have been threatened with dispossession. The department believes that in order to keep faith with the Indians, the tax warrants and tax assessments should be paid * * *. The bill [Act of June 20, 1936], authorizes the appropriation of money for that purpose" (Congressional Record, *supra*).

It has been observed that the majority opinion of the Circuit Court awarded recovery of 1937 ad valorem taxes to respondents because their grantor, Wosey John Deere, owned a life estate in the land on January 1 of that year, the date on which taxable status for the year was fixed.

And the following portions of the minority opinion of the Circuit Court have been quoted:

> "The Creeks * * * could not properly be denominated landless Indians * * * Lands were allotted to their members * * *. Under * * * acts of April 12, 1926, and May 10, 1928, Congress continued in applicable cases not only restrictions, but also non-taxability not exceeding 160 acres held by an allottee after April 26, 1931. That would cover the original allotted lands of Wosey John Deere (130 Fed. [2d] 682, 683).
>
> * * * * * * * *
>
> "The court takes judicial knowledge of the fact that the inherited restricted estate of Wosey John Deere in the custody of the Secretary of the Interior on Sep-

tember 2, 1938, amounted to $359,643, and the record shows that these appellants were her heirs" (130 Fed. [2d] 685).

There was clearly no legislative intent to authorize tax exemption on land held by an Indian such as Wosey John Deere. It has been observed that the Act of June 20, 1936, appropriated $25,000 to pay real property taxes for Indians. Certainly this was not done for the relief of an Indian who owned property valued at more than three hundred thousand dollars. It has been seen that Senator Elmer Thomas, sponsor of the legislation in question, informed the Senate that the legislation would apply only to land bought for "landless" Indians. But Wosey John Deere was not a "landless" Indian—she was the owner of allotted Creek land.

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2. The Act of June 20, 1936, limited tax exemption to "* * * lands, the TITLE to which is now held by an Indian * * *, heretofore purchased out of trust or restricted funds of SAID Indian," and the Act of May 19, 1937, limited the tax exemption to HOMESTEAD lands. Since the land in question was purchased out of the funds of respondents' grantor rather than the funds of respondents, respondents cannot claim tax exemption.

It has been observed that respondents acquired fee simple title to the land in question on December 10, 1937, and that respondents designated the land as a homestead on December 16, 1937, under Act of May 19, 1937. The majority opinion of the Circuit Court awarded recovery of 1938, 1939 and 1940 ad valorem taxes to respondents

because they owned the land on January 1 of each of those years, that being the date on which taxable status was fixed.

It would seem that the Act of May 19, 1937, was passed because the Act of June 20, 1936, had been found to be entirely too broad and indiscriminate. Much of the property which had been bought for "landless" Indians was producing an income ample for the payment of taxes, and certain Indians deliberately allowed taxes to accumulate, relying on the bounty of the government. The circumstances demanded the imposition of a limitation. Said Senator Thomas:

> "Since the passage of said Act of June 20, 1936 (49 Stat. L. 1542), it was found the provisions of section 2 thereof * * * would exempt from taxation vast quantities of property such as * * * farm lands which are not homesteads, etc."

Therefore, section 2 of the Act of June 20, 1936, was stricken and a substitute section 2 was furnished for said Act by the amendment of May 19, 1937, containing the following provision:

> "Sec. 2. All homesteads heretofore purchased out of the trust or restricted funds of individual Indians are hereby declared to be instrumentalities of the Federal Government and shall be non-taxable * * *. The Indian * * * shall select * * * either * * * lands * * * or city property * * * to be designated as a homestead."

There is every reason to assume that the 1937 Act was intended to be a limitation on the 1936 Act. There is no reason to assume that the 1937 Act was intended to ex-

tend and broaden the 1936 Act. Yet, the majority opinion of the Circuit Court held, in effect, that—while the 1936 Act made the tax exemption a personal right, limited to the person whose funds were used to purchase the land—the 1937 Act extended the tax exemption to subsequent takers of such land. Thus the majority opinion said:

> "* * * Congress * * * on May 19, 1937, eliminated the ambiguity provoking language contained in the original act by declaring that all homesteads heretofore purchased with trust or restricted funds of an individual Indian, restricted against alienation without the approval of the Secretary of the Interior, were instrumentalities of the Federal Government and exempt from all taxes * * *."

We are unable to see why the 1937 Act should be interpreted to render the land in question tax exempt in perpetuity. The tax exemption was, at most, designed to protect the individual Indian out of whose restricted funds the land was purchased. No evidence exists from which it can be assumed that there was any legislative intent to benefit grantees. On the floor of the Senate Senator Thomas, sponsor of the legislation in question, advocated passage of the 1937 Act in the following language:

> "Since the passage of said Act of June 20, 1936 (49 Stat. L. 1542), it was found the provisions of section 2 thereof * * * would exempt from taxation vast quantities of property such as * * * *farm lands which are not homesteads*, etc." (Congressional Record).

CONCLUSION

We do not threaten that Oklahoma will secede from the Union if this Court does not grant the prayer of this petition. We recognize that the Civil War established the supremacy of the federal power, and that a part of that power resides in the federal judiciary. But we recall that it was only a few short years ago that Mr. Justice Stone was compelled to write memorable words of protest: "* * * The only check upon our own exercise of power is our sense of self-restraint." This was a counsel of restraint in dealing with Acts of Congress. In the case at bar, we pray that restraint be exercised in dealing with state taxation and exemption therefrom.

We realize that this Court has no desire to burden itself with obscure problems arising out of special Indian legislation, when a myriad of consequential social problems press for attention. We realize that most "Indian" cases are of slight significance to any persons beyond the litigants, and that such cases are but a minor eddy in the broad stream of judicial business.

But we must respectfully insist that this is no trival case. The very solvency of many Oklahoma counties and school districts may well be contingent upon the decision reached here. The Acts of Congress in question were interpreted by the court below to mean that, when restricted Indian funds are used to purchase a 160-acre homestead, the 160 acres are immune from state taxation, even when

they pass to persons who are not enrolled in any Indian tribe. Restricted Indian funds are not so small but that they could be used in this fashion to remove a very significant proportion of Oklahoma property from the tax rolls.

However, we have no desire to overstate the case. We do not pretend that the State of Oklahoma could not survive an adverse decision. And, after all, the breakdown of a system of state taxation might be merely a reflection on the wisdom of the legislation responsible, rather than a test of constitutionality. Be that as it may, we do believe that the principle involved here does justify this Court in taking jurisdiction.

Constructive efforts of the Federal Government, to function in a field of national concern, are no longer thwarted by this Court on the basis of any threadbare "states' rights" concept. But this appeal does not involve an attempt by Congress to regulate or control conditions which are beyond the effective power of the state. Nor does it involve an attempt by Congress "to regulate commerce with the Indian Tribes" or to enforce treaties. This appeal deals with the power of Congress to deprive a state of the power to tax the lands of an American citizen of Indian blood where no treaty or tribal land is involved.

A great deal has been said in the cases about the guardianship to be exercised by Congress over its Indian wards. And, after many years of abuse and broken faith on the

part of the Federal Government, it has been good to see the development of such a wholesome attitude. While there may be those who would explain this new approach as the manifestation of a guilty conscience, we need not inquire into that here.

A large number of our present citizens of Indian blood are not enrolled in any tribe, and, in Oklahoma at least, tribal government is of little practical significance. Congress may feel, however, that many citizens of Indian blood—even though not enrolled in any tribe—are poor business men and unable to pay state taxes on lands (other than tribal lands) which they have acquired by inheritance, gift or purchase. And such a conclusion might not be without foundation. (Peculiarly enough, the burden of taxes has been found an insuperable obstacle to retention of land by many citizens without a drop of Indian blood).

Now if Congress desires to shower its beneficence on such citizens of Indian blood, it probably needs no express constitutional authorization to do so. If Congress desires to appropriate the money necessary to pay the state taxes accruing on the property of such Indians, we have no desire to stand in the way. But we do vigorously protest when Congress expects its splendid manifestation of generosity to be paid for out of the Oklahoma pocketbook. If we are inclined to view with suspicion the tender expressions of solicitude for the Indian wards which have issued forth from the Congress and the Federal courts, we

trust that our attitude is understandable. There has been no showing that Oklahoma has handled the Indian situation improperly. If there be any governmental responsibility for the plight of any of our citizens of Indian blood, then it is the responsibility of forty-eight states, not one. We assert that neither the Constitution nor reason afford any justification for interference with state taxation in this case.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power, by granting a writ of certiorari and thereafter reviewing the opinion of the United States Circuit Court of Appeals for the Tenth Circuit and reversing the decision below.

Respectfully submitted.

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Counsel for Petitioners.

November, 1942.

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MAR 1 1943
CHARLES ELMORE CROPLEY
CLERK

In The
Supreme Court of The United States

OCTOBER TERM, 1942

No. 556

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, a Municipal Corporation, ET AL.,
Petitioners,

VERSUS

EVELYN SEBER ET AL.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

Certiorari Granted January 11, 1943

PETITIONERS' BRIEF

MAC Q. WILLIAMSON,
Attorney General of the State of Oklahoma;
HOUSTON E. HILL,
Assistant Attorney General;
NORMAN J. FUTOR,
Assistant Attorney General;
EVERETT S. COLLINS,
County Attorney, Creek County,
Counsel for Petitioners.

February, 1943.

KING LAW BRIEF CO., INC., 418 N.W. THIRD, OKLAHOMA CITY—PHONE 3-2969

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Proposition 2. The Act of Congress of June 20, 1936 (which deals with lands purchased out of an individual Indian's own restricted funds), and the Act of May 19, 1937 (which amends said 1936 Act by limiting it to homesteads), are not applicable to the lands here involved:

1. The Acts apply only to a "landless" Indian who had never held lands prior to the purchase of property for him out of restricted funds; said Acts have no application to an Indian such as Wosey John Deere who was at all times possessed of a Creek allotment and who died on September 2, 1938, possessed of property valued at $359,643 18

Authorities Cited:—

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2. The Act of June 20, 1936 limited tax exemption to ****lands, the TITLE to which is now held by an Indian***, heretofore purchased out of trust or restricted funds of SAID Indian, "and the Act of May 19, 1937, limited the tax exemption to HOMESTEAD lands. Since the land in question was purchased out of the funds of respondents' grantor rather than the funds of respondents', respondents cannot claim tax exemption 21

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In The
Supreme Court of The United States
OCTOBER TERM, 1942

No. 356

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, a Municipal Corporation, ET AL.,
Petitioners,

VERSUS

EVELYN SEBER ET AL.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

Certiorari Granted January 11, 1943

PETITIONERS' BRIEF

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States.

Your petitioners respectfully show:

I.

THE OPINION OF THE COURT BELOW

Petitioners pray for a review of the judgment entered in case No. 2488 in the Circuit Court of Appeals for the Tenth Circuit, on September 2, 1942 (T. 99). A majority opinion (130 Fed. [2d] 663, T. 56), and a minority opinion (130 Fed. [2d] 671, T. 67), were written. No petition for rehearing was filed.

II.

STATEMENT OF THE CASE

This is an action in which the Circuit Court below (with dissenting opinion) permitted respondents to recover ad valorem taxes paid for the years 1937, 1938, 1939 and 1940 on the following described land in Creek County, Oklahoma:

> W½ of SW¼ of Sec. 27-18N-11E; W½ of NW¼ of SW¼ of SW¼, and W½ of E½ of NW¼ of SW¼ of SW¼ of Sec. 36-18N-11N, containing 87½ acres (130 Fed. [2d] 666).

All of the above described lands involved in this action have been continuously on the tax rolls of Creek County, Oklahoma, and the political subdivisions of the county, wherein said lands are located.

The majority opinion of the Circuit Court also upheld a declaratory judgment decreeing the land tax exempt. Although certain additional land was originally involved in the action, the above described land is all that need be considered for the purposes of this petition.

Respondents, as tenants in common, are the owners of said land, having acquired fee simple title thereto by gift on December 10, 1937. On December 16, 1937, respondents designated said land as homestead, under Act of Congress of May 19, 1937. Although respondents happen to be possessed of full Indian blood, they are not enrolled as members of any Indian tribe. Petitioners are public officials of Creek County, Oklahoma.

Respondents' grantor was their mother, Wosey John Deere. She was enrolled opposite Roll No. 9546 of the Creek Tribal Roll. Said land had been purchased for her prior to 1927 out of her restricted funds in the custody of the Secretary of the Interior. Wosey John Deere reserved an interest (life estate) in said land in a conveyance made to respondents on March 4, 1931, but she conveyed said reserved interest to respondents on December 10, 1937. At all times material herein, Wosey John Deere was possessed of a homestead which had been alloted to her by virtue of her tribal enrollment. As was said in the minority opinion (130 Fed. [2d] 682, 683):

> "The Creeks • • • could not properly be denominated landless Indians • • • Lands were allotted to their members • • • Under • • • acts of April 12, 1926, and May 10, 1928, Congress continued in applicable cases not only restrictions, but also non-taxability not exceeding 160 acres, held by an allottee after April 26, 1931. That would cover the original allotted lands of Wosey John Deere • • • ."

Respondents inherited $359,643 from said grantor, Wosey John Deere, who died on September 2, 1938. On the basis

of cases numbered 2558, 2559, 2560, pending in the Circuit Court of Appeals, styled *United States* v. *Oklahoma Tax Commission*, the minority opinion of the Circuit Court said (130 Fed. [2d] 685):

> "The court takes judicial knowledge of the fact that the inherited restricted estate of Wosey John Deere in the custody of the Secretary of Interior on September 2, 1938, amounted to $359,643, and the record shows that these appellants were her heirs * * *."

The majority opinion of the Circuit Court was based upon the following Congressional Acts:

Act of Congress of June 20, 1936 (49 Stat. L. 1542):

> "Sec. 1. * * * There is hereby authorized to be appropriated * * * the sum of $25,000, to be expended * * * for the payment of taxes * * * assessed against individually owned Indian land, the title to which is held subject to restrictions against alienation or encumbrance * * * heretofore purchased out of trust or restricted funds of an Indian, where the Secretary (of Interior) finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase it would be non-taxable * * *.
>
> "Sec. 2. All lands, the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress."

Amendatory Act of Congress of May 19, 1937 (50 Stat. L. 188, 25 U. S. C. A., Sec. 412a (amended Sec. 2 above to read as follows):

"Sec. 2. All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be non-taxable until otherwise directed by Congress: Provided, That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior; and, provided further, that the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town or city property, not exceeding in cost $5000.00, to be designated as a homestead."

The majority opinion said (130 Fed. [2d] 670):

"The taxable status of all property in Oklahoma is fixed as of January first of each year * * *."

The Act of June 20, 1936, was in force on January 1, 1937, and it was under that Act that the majority opinion permitted recovery of 1937 ad valorem tax.

The Act of May 19, 1937, was in force on January 1, 1938, and respondents had designated the land as homestead on December 16, 1937, and it was under that Act that the majority opinion permitted recovery of 1938, 1939 and 1940 ad valorem tax.

This action involved no disputed questions of fact (See Agreed Statement of Fact, T. 37-46).

III.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in holding that the Acts of Congress in question are constitutional.

2. The Circuit Court of Appeals erred in holding that the Acts of Congress in question are applicable to the land here involved.

a. The court erred in holding that Wosey John Deere (who possessed a Creek allotment at the time the land in question was purchased for her, and whose property was valued at $359,643) was in the category of persons entitled to receive the benefits of Act of Congress of June 20, 1936 (49 Stat. L. 1542).

b. The court erred in holding that respondents (who were possessed of full Indian blood, but were not enrolled in any Indian tribe or possessed of any restricted funds) and who acquired the land in question by gift, were in the category of persons entitled to receive the benefits of Act of Congress of June 20, 1936 (49 Stat. L. 1542), as amended by Act of Congress of May 19, 1937 (50 Stat. L. 188, 25 U. S. C. A., Sec. 412a).

3. The Circuit Court of Appeals erred in holding that—because Wosey John Deere owned an interest in the land in question on January 1, 1937—respondents were entitled to recover ad valorem taxes paid on said land for the year 1937, even though neither Wosey John Deere nor the administrator of her estate were parties to this action.

4. The Circuit Court of Appeals erred in permitting respondents to recover ad valorem taxes which had been paid on the land in question more than three years before the filing of this action, such action being barred by the statute of limitations of the State of Oklahoma.

5. The Circuit Court of Appeals erred in upholding Federal jurisdiction in this action, in view of Section 12665, O. S. 1931, which has the effect of requiring that actions for

the recovery of illegally collected taxes shall be filed in the courts of the State of Oklahoma rather than the Federal courts.

IV.

ARGUMENT IN CHIEF

PROPOSITION 1.

The Acts of Congress in question are unconstitutional because the Congress of the United States cannot, for purposes of exemption from state taxation, create a "Federal instrumentality" out of the person or propery of an individual merely because such individual is possessed of a quantum of Indian blood.

The majority opinion of the Circuit Court purports to dispose of the constitutional question in the following language (130 Fed. [2d] 670):

> "The exemption granted here is based upon the power of the Federal Government to create a Federal instrumentality out of lands heretofore taxable by the State of Oklahoma, and to immunize them against taxation."

The above statement was made by the court without citation of authority. More serious is the fact that the above statement begs the question. Of course, the Federal Government can—in pursuance of a bona fide constitutional purpose—create a Federal instrumentality, immune from state taxation. But it is the position of the State of Oklahoma that the Federal Government cannot, for purposes of exemption from state taxation, create a "Federal instrumentality" out of the person or property of an individual merely because such individual is possessed of a quantum of Indian blood.

There is dictum in the case of *Shaw* v. *Gibson-Zahniser Oil Corporation*, 276 U. S. 575, 72 L. ed. 709, which may appear to support the majority opinion of the Circuit Court. The following unfortunate language was used in that case:

> "The construction to be placed on these decisions is that the lands now in question, and hence the interest of the lessee in them are not such instrumentalities of the government as will be declared immune from taxation in the absence of an express exemption by congress * * *."

But since when has Congress ever had the power to confer immunity from taxation on a person by turning him into a Federal instrumentality, even though some Indian blood be involved? Whence came this Circe-like power? The commerce clause of the Constitution (Art. 1, Sec. 8), provides that Congress shall have power "to regulate commerce with foreign nations and among the several states, and with the Indian Tribes * * *." This is a far cry from granting exemption from state taxation to individuals without tribal status who happen to have a quantum of Indian blood.

On principle, the use of the concept "Federal instrumentality" in connection with individuals possessed of some Indian blood, constitutes an abuse no less serious than the use of the concept of "freedom of contract" in connection with certain regulatory measures. Neither of these two concepts are to be found in the Constitution. Both may, on occasion serve a useful purpose. The Supreme Court, as now constituted, has recognized that "freedom of contract" has too often been used to arrive at decisions which could not be sustained by the language of the Constitution or the logic of

events. The phrase "freedom of contract" has lost its place in the abracadabra of constitutional ritual, and societal control is no longer to be confined by such an incantation. Now let the jargon of legalistic conjuration be further delimited by stripping the "instrumentality" gloss from the simple constitutional reference to Indian tribes.

Upon the recurrent use in our case law of the term "federal instrumentality" we are moved to insert an observation in a recent (concurring) opinion by Mr. Justice Frankfurter (*Tiller* v. *Atlantic Coast Line Co.*, 87 S. Ct. No. 8, p. 454, wherein it was said:

> "• • • an excellent illustration of the extent to which uncritical use of words bedevils the law • • •. A phrase begins life as a literary expression; its felicity leads to its lazy repetition and repetition soon establishes it as a legal formula undiscriminatingly used to express different and sometimes contradictory ideas • • •."

Helvering v. *Mountain Producers Corp.*, 303 U. S. 376, 58 S. Ct. 623, 82 L. ed. 907, has pointed the way to rectification of the boundaries of tax exemption on lands affected by Indian rights. It has an indirect bearing on the present validity of the dictum in *Shaw* v. *Gibson-Zahniser Oil Corp.*, *supra*, to which reference has been made. That case involved land purchased for a full blood enrolled Creek Indian from the accumulated royalties of a departmental lease of his restricted and allotted lands. The court held that said lands were subject to ad valorem taxation and in the opinion rendered by Justice (now Chief Justice) Stone, the Court said:

> "In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in

this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process. But they are far less intimately connected with the performance of an essential governmental function than were the restricted allotted lands, and the accomplishment of their purpose obviously does not require entire independence of state control in matters of taxation. To hold them immune would be inconsistent with one of the very purposes of their creation, to educate the Indians in responsibility, and would present the curious paradox that the Secretary by a mere conveyancer's restriction, permitted by Congress, had rendered the land free from taxation and thus actually relieved the Indians of all responsibility. There are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks (citing cases)."

And in said case the Court further said:

"* * * Neither leases of * * * [restricted allotted or tribal] lands, Indian Territory Illuminating Oil Co. v. Oklahoma * * *, nor the exploitation of the land by the lessee, Howard v. Gypsy Oil Co. * * *, Large Oil Co. v. Howard * * *, Choctaw O. & G. R. Co. v. Harrison * * *, Jaybird Min. Co. v. Weir * * *, nor his income from the lease, Gillespie v. Oklahoma, * * *, may be taxed by the state."

But in *Helvering* v. *Mountain Producers Corp.*, *supra*, the Court said:

"We are convinced that the rulings in *Gillespie* v. *Oklahoma* * * *; and Burnet v. Coronado Oil & Gas Co., are out of harmony with correct principle and accordingly they should be, and they now are, overruled."

And further:

"We have always recognized that no constitutional implications prohibit a non-discriminatory tax upon the

property of an agent of the government merely because it is the property of such an agent and used in the conduct of the agent's operations and necessary for the agency."

And here is a point to be stressed: To hold, in *Helvering* v. *Mountain Producers Corp.*, *supra*, that certain cases were "out of harmony with correct principle," necessitated an outright overruling of those cases: but to hold that a certain dictum in *Shaw* v. *Gibson-Zahniser*, *supra*, is "out of harmony with correct principle," requires nothing so drastic. This is the very first time that this Court has had occasion to pass upon the power of Congress to render lands exempt from state taxation where tribal rights are not involved. The cases sustaining tax exemption have dealt with lands allotted to individuals out of tribal holdings, and those lands were exempt from taxation under treaties executed between the Indian tribes and the United States before Oklahoma acquired statehood. Naturally, Oklahoma entered upon statehood subject to vested treaty rights.

But questions of tribal lands and treaty rights do not arise in the case at bar. The landowner respondents are not enrolled in any Indian tribe. The mere fact that they are of Indian blood does not place them in any special constitutional category. The lands in question were taxable in the hands of their grantor's predecessor in title. The lands were purchased for their grantor out of her restricted Indian funds, not out of any funds belonging to them. To refer to these landowner respondents as "Federal instrumentalities" is

certainly the *reductio ad absurdum* of the "instrumentality" concept.

The majority opinion of the Circuit Court has stressed provisions in the Enabling Act and the Oklahoma Constitution which relate to Indian property rights and the authority of the United States to regulate such rights. Such provisions have no application here. They are to be read in the light of the conditions obtaining at the time of the admission of the State of Oklahoma into the Union.

At the time of the admission, a considerable amount of land within the boundaries of Oklahoma was subject to tax exemption by virtue of treaties made by the United States with Indian tribes. Naturally, the United States had no right to violate its treaty obligations. The United States had no right to make any agreement with Oklahoma that would impair those treaty obligations. Oklahoma knew what those treaty obligations were, and assumed the status of statehood with full knowledge of their provisions. Thus Oklahoma entered upon statehood subject to certain tax exemptions, the extent of which was clearly defined and well known to the Indians, the United States and Oklahoma. It was exemption of this character which has been many times upheld by the Supreme Court of the United States. *Choate* v. *Trapp*, 224 U. S. 665.

It must be emphasized that the tax exemption, under consideration at the time of the Enabling Act and the Oklahoma Constitution, attached to certain definite and specific

tribal lands. The fact that the ownership of such tribal lands was, at that time, in process of passing from ownership in common to ownership in severalty, is not material, because the change in character of ownership could not extend the boundaries of the tax-exempt land beyond the limits which had been agreed upon by the United States, Oklahoma and the Indians.

A specific tax exemption on specific lands, originally tribal in character, was the only type of tax exemption ever considered. It was the only type of tax exemption that could possibly be valid. It is important that this issue not be confused with the power of the United States to impose RESTRICTIONS on its Indian wards. The power of the United States to make judgments as to the degree of competence possessed by individual Indians cannot be challenged by a state. That is a matter between the United States and the individual Indian. That power is not dependent upon any acquiescence by a state in its Enabling Act or its Constitution; no state in the Union can escape its exercise. Oklahoma's situation in that respect is not inferior to the situation of any other state.

Never has the Supreme Court of the United States held that PURCHASED lands, other than those of a tribal character, could be rendered tax-exempt by mere fiat of Congress, simply because they were owned by an individual Indian, or because restricted funds of an Indian grantor were used in their purchase.

Prior to the passage of the 1936 and 1937 Acts of Congress the law seemed to be absolutely settled that lands such as are involved in this suit were subject to taxation by the State. *United States* v. *Ransome*, 263 U. S. 691; *McCurdy* v. *United States*, 246 U. S. 263; *United States* v. *Gray*, 284 Fed. 103; *Shaw* v. *Gibson-Zahniser Oil Corp.*, *supra*; *U. S.* v. *Mummert*, 15 Fed. (2d) 926.

In the case of *United States* v. *Wright*, 53 Fed. (2d) 300 (cited by respondents), the controlling issue was one of title. The district court had *assumed* that title to the land in question was held by individual Indians, but was reversed when the circuit court found that title was held by the United States in trust. Lands, title to which is in the United States, are of course exempt from state taxation. But when applied to a situation in which title is *actually held by individual Indians* (as in the case at bar) rather than the United States, the analysis made by the district court appears to be very sound. In that court, the case was styled *United States* v. *Swain County, North Carolina*, 46 Fed. (2d) 99, being an action to enjoin collection of taxes. Defendant county officers contended that the Act of Congress (43 Stat. 376) attempting to exempt said lands from taxation, was unconstitutional. In giving consideration to the following quotation from the district court opinion, it should be borne in mind that the circuit court, in reversing the case, neither criticized nor questioned the soundness of what here follows:

"Has Congress the power to exempt these lands from state and county taxes? * * * In the Articles of Confederation of 1777 the states were careful to give to the congress the power, only, to regulate 'trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated.' It is therefore clear that the states which banded themselves together and won their freedom from Great Britain understood that the lands within their borders, occupied by Indians, belonged to these individual states, and congress could only manage the affairs of the Indians and regulate their trade when such Indians were not members of any of the respective states * * *.

"In the well-considered case of *Union P. Railroad Co. v. Peniston*, 18 Wall. 29, 21 L. ed. 787, the Supreme Court of the United States, in an opinion by Justice Strong, well and clearly stated:

" 'That the taxing power of the state is one of its attributes of sovereignty; that it exists independently of the Constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all property, trades, business and avocations existing or carried on within the territorial boundaries of the state, except so far as it has been surrendered to the Federal government, either expressly or by necessary implication, are propositions that have often been asserted by this court. And in thus acknowledging the extent of the power to tax lands belonging to the states, we have declared that it is indispensable to their continued existence * * *. And the Constitution contains no express restriction of this power other than a prohibition to lay any duty of tonnage, or any impost, or duty on imports or exports, except what may be absolutely necessary for executing the state's inspection laws * * *.

The states are, and they must ever be, coexistent with the National government. Neither may destroy the other. Hence the Federal Constitution must receive a practical

construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise.

"Counsel for complainant contends that the winding up of the tenancy in common of these Indians is in some way an instrumentality of the government, and he cites in support of that contention the famous case of *McCulloch* v. *Maryland*, 4 Wheat. 316, 436, 4 L. ed. 579; but I cannot find support for this contention in the opinion of Chief Justice Marshall in this famed case • • •.

"It will be seen that even in this case where an instrumentality of the government, to-wit, the United States Bank, owned real estate within the State of Maryland, the Chief Justice holds that the State of Maryland could levy a tax upon its real estate.

"In the case of Union P. Railroad Co. v. Peniston, referred to above, the Supreme Court held that although a railroad corporation chartered by Congress, which Congress assisted by donations and loans, of whose board of directors the government appoints two, and which makes annual reports to the government, and whose railroad and telegraph lines are subject to the regulations imposed by its charter, and subject to such further regulations as Congress may make, and to which the Congress has donated many millions of dollars, and to which Congress makes grants of land, and that said railroad should transmit dispatches and transport mails, troops and munitions of war, supplies and public stores for the government whenever required to do so by any department thereof, such corporation is not an instrumentality of the government to the extent that its real estate may not be taxed by the State of Nebraska. It cannot be argued with force that the ownership of a few thousand acres of mountain land in Swain County, N. C., by a small band of Indians, is in any sense an instrumentality of the government.

"• • • The land on which they now live, according to my conception, was never owned by the Federal govern-

ment, and the President and the Senate have never made any treaty with this band providing that their land should be exempt from state and county taxation. I cannot see, therefore, that the levying of taxes by Swain County on these lands at the same rates that other lands are assessed in that county can in any way be regarded as a tax burden on an instrumentality of the government of the United States * * *.

"* * * but the fact that they are wards of the government gives no more right to exemption from taxation than would be given to wards of other guardians scattered throughout North Carolina. There are many orphans throughout the state who have guardians, but the Federal government has no power to exempt their lands from taxation. There are many flood sufferers and earthquake victims throughout the United States and the world, to whose relief the Federal government has contributed money; but certainly it could not be argued that the lands which such sufferers might own within the boundaries of the various states could be exempted by the Federal government from state taxation. Surely it cannot be argued that an Indian or an Indian tribe or family could go into the various states either actually or by an agent, and purchase with personal funds rural lands or city lots and claim exemption from state taxation by reason of the fact that they are Indians. Nor could Congress exempt such lands from state taxation. *The particular character of a citizen of the United States or of a state does not take away from the several states the sovereign power of taxing his lands within their respective boundaries, unless such lands were donated, allotted, and set apart to such individual by the Federal government from and out of Federal lands or public domain* * * * (Italics ours).

"It is contended by counsel for complainant, in his brief, that:

"'From this legislation it is the policy of Congress where it is deemed necessary for the proper protection of the property of the Indians and the right of the United

States to supervise their property and affairs, to exempt their lands and property from taxation.'

"This statement is undoubtedly true with reference to all lands in the public domain which were assigned to Indians by the United States, but *I can find no instance in all the writings on Indian affairs, or in the multitude of judicial opinions, where the Congress has ever undertaken to exempt land from taxes where such land has been purchased by Indians, from the state, as in the case at bar* * * * (italics ours).

"For the foregoing reasons I am compelled to conclude and hold that the act of Congress of June 4, 1924, in so far as it attempts to exempt these Cherokee lands from state and county taxation, is unconstitutional and void."

Respondents are unenrolled Indians, without tribal status, who received the lands in question by gift from their mother, Wosey John Deere. And the lands were purchased out of the restricted funds of Wosey John Deere—not out of funds of respondents. Again, we assert that the Congress of the United States cannot, for purposes of exemption from state taxation, create a "Federal instrumentality" out of the person or property of an individual, merely because such individual is possessed of a quantum of Indian blood.

PROPOSITION II

The Act of Congress of June 20, 1936 (which deals with lands purchased out of an individual Indian's own restricted funds), and the Act of Congress of May 19, 1937 (which amends said 1936 Act by limiting it to homesteads), are not applicable to the lands here involved.

1. The Acts apply only to a "landless" Indian who had never held land prior to the purchase of property for him out of restricted funds; said Acts have no application to an Indian such as Wosey John Deere who was at all times possessed of a Creek allotment and who died on September 2, 1938, possessed of property valued at $359,643 (see minority opinion).

Because of the fact that so large a proportion of the Oklahoma Indians have been the beneficiaries of allotted lands, there has been a tendency to overlook the fact that large numbers of American Indians were not included in the treaties made by the United States with Indian tribes, relative to land distribution.

On behalf of certain American Indians who were "landless," a program of land purchase was entered upon some years ago. The Acts in question relate to that program. When the Act of June 20, 1936, was considered on the floor of the Senate, Senator Elmer Thomas referred to the program as follows:

> "• • • The Congress authorized the Secretary of the Interior to buy land for landless Indians. The Secretary proceeded to buy the lands and assigned the Indians to reside upon such lands" (Congressional Record for the Senate for June 6, 1936, page 9159).

However, the program ran into difficulties. Apparently, those in charge of it failed to make clear to the Indians the fact that the privilege of land ownership carried burdens such as taxes. Senator Thomas described the situation as follows:

"The recommendation or assertion was made to the Indians that the land would be theirs and they would have no taxes to pay * * *. In some cases tax warrants have been issued and the Indians have been threatened with dispossession. The department believes that in order to keep faith with the Indians, the tax warrants and tax assessments should be paid * * *. The bill [Act of June 20, 1936], authorizes the appropriation of money for that purpose" (Congressional Record, *supra*).

It has been observed that the majority opinion of the Circuit Court awarded recovery of 1937 ad valorem taxes to respondents because their grantor, Wosey John Deere, owned a life estate in the land on January 1 of that year, the date on which taxable status for the year was fixed.

And the following portions of the minority opinion of the Circuit Court have been quoted:

"The Creeks * * * could not properly be denominated landless Indians * * * Lands were allotted to their members * * *. Under * * * Acts of April 12, 1926, and May 10, 1928, Congress continued in applicable cases not only restrictions, but also non-taxability not exceeding 160 acres held by an allottee after April 26, 1931. That would cover the original allotted lands of Wosey John Deere (130 Fed. [2d] 682, 683).

* * * * * * * * * *

"The court takes judicial knowledge of the fact that the inherited restricted estate of Wosey John Deere in the custody of the Secretary of the Interior on September 2, 1938, amounted to $359,643, and the records show that these appellants were her heirs" (130 Fed. [2d] 685).

There was clearly no legislative intent to authorize tax exemption on land held by an Indian such as Wosey John Deere. It has been observed that the Act of June 20, 1936,

appropriated $25,000 to pay real property taxes for Indians. Certainly this was not done for the relief of an Indian who owned property valued at more than three hundred thousand dollars. It has been seen that Senator Elmer Thomas, sponsor of the legislation in question, informed the Senate that the legislation would apply only to land bought for "landless" Indians. But Wosey John Deere was not a "landless" Indian—she was the owner of allotted Creek land.

---

2. The Act of June 20, 1936, limited tax exemption to * * * lands, the TITLE to which is now held by an Indian * * *, heretofore purchased out of trust or restricted funds of SAID Indian," and the Act of May 19, 1937, limited the tax exemption to HOMESTEAD lands. Since the land in question was purchased out of the funds of respondents' grantor rather than the funds of respondents, respondents cannot claim tax exemption.

It has been observed that respondents acquired fee simple title to the land in question on December 10, 1937, and that respondents designated the land as a homestead on December 16, 1937, under Act of May 19, 1937. The majority opinion of the Circuit Court awarded recovery of 1938, 1939 and 1940 ad valorem taxes to respondents because they owned the land on January 1 of each of those years, that being the date on which taxable status was fixed.

It would seem that the Act of May 19, 1937, was passed because the Act of June 20, 1936, had been found to be entirely too broad and indiscriminate. Much of the property

which had been bought for "landless" Indians was producing an income ample for the payment of taxes, and certain Indians deliberately allowed taxes to accumulate, relying on the bounty of the government. The circumstances demanded the imposition of a limitation. Said Senator Thomas:

> "Since the passage of said Act of June 20, 1936 (49 Stat. L. 1542), it was found the provisions of section 2 thereof * * * would exempt from taxation vast quantities of property such as * * * farm lands which are not homesteads, etc."

Therefore, section 2 of the Act of June 20, 1936, was stricken and a substitute section 2 was furnished for said Act by the amendment of May 19, 1937, containing the following provision:

> "Sec. 2. All homesteads heretofore purchased out of the trust or restricted funds of individual Indians are hereby declared to be instrumentalities of the Federal government and shall be non-taxable * * *. The Indian * * * shall select * * * either * * * lands * * * or city property * * * to be designated as a homestead."

There is every reason to assume that the 1937 Act was intended to be a limitation on the 1936 Act. There is no reason to assume that the 1937 Act was intended to extend and broaden the 1936 Act. Yet, the majority opinion of the Circuit Court held, in effect, that—while the 1936 Act made the tax exemption a personal right, limited to the person whose funds were used to purchase the land—the 1937 Act extended the tax exemption to subsequent takers of such land. Thus the majority opinion said:

"• • • Congress • • • on May 19, 1937, eliminated the ambiguity provoking language contained in the original act by declaring that all homesteads heretofore purchased with trust or restricted funds of an individual Indian, restricted against alienation without the approval of the Secretary of the Interior, were instrumentalities of the Federal government and exempt from all taxes • • •."

We are unable to see why the 1937 Act should be interpreted to render the land in question tax exempt in perpetuity. The tax exemption was, at most, designed to protect the individual Indian out of whose restricted funds the land was purchased. No evidence exists from which it can be assumed that there was any legislative intent to benefit grantees. On the floor of the Senate Senator Thomas, sponsor of the legislation in question, advocated passage of the 1937 Act in the following language:

"Since the passage of said Act of June 20, 1936 (49 Stat. L. 1542), it was found the provisions of section 2 thereof • • • would exempt from taxation vast quantities of property such as • • • *farm lands which are not homesteads, etc.*" (Congressional Record).

CONCLUSION

We recall that it was in only a few short years that Mr. Justice Stone was compelled to write memorable words of protest: "• • • The only check upon our own exercise of power is our sense of self-restraint." This was a counsel of restraint in dealing with Acts of Congress. In the case at bar, we pray that restraint be exercised in dealing with state taxation and exemption therefrom.

This is no trivial case. The very solvency of many Oklahoma counties and school districts may well be contingent upon the decision reached here. The Acts of Congress in question were interpreted by the court below to mean that, when restricted Indian funds are used to purchase a 160-acre homestead, the 160 acres are immune from state taxation, *even when they pass to persons who are not enrolled in any Indian tribe.* Restricted Indian funds are not so small but that they could be used in this fashion to remove a very significant proportion of Oklahoma property from the tax rolls.

Constructive efforts of the Federal Government, to function in a field of national concern, are no longer thwarted by this Court on the basis of any threadbare "states' rights" concept. But this appeal does not involve an attempt by Congress to regulate or control conditions which are beyond the effective power of the state. Nor does it involve an attempt by Congress "to regulate commerce with the Indian tribes" or to enforce treaties. This appeal deals with the power of Congress to deprive a state of the power to tax the lands of an American citizen of Indian blood where no treaty or tribal land is involved.

A great deal has been said in the cases about the guardianship to be exercised by Congress over its Indian wards. And, after many years of abuse and broken faith on the part of the Federal Government, it has been good to see the development of such a wholesome attitude. While there may be

those who would explain this new approach as the manifestation of a guilty conscience, we need not inquire into that here.

A large number of our present citizens of Indian blood are not enrolled in any tribe, and, in Oklahoma at least, tribal government is of little practical significance. Congress may feel, however, that many citizens of Indian blood—even though not enrolled in any tribe—are poor businessmen and unable to pay state taxes on lands (other than tribal lands) which they have acquired by inheritance, gift or purchase. And such a conclusion might not be without foundation (Peculiarly enough, the burden of taxes has been found an insuperable obstacle to retention of land by many citizens without a drop of Indian blood).

Now if Congress desires to shower its beneficence on such citizens of Indian blood, it probably needs no express constitutional authorization to do so. If Congress desires to appropriate the money necessary to pay the state taxes accruing on the property of such Indians, we have no desire to stand in the way. But we do vigorously protest when Congress expects its splendid manifestation of generosity to be paid for out of the Oklahoma pocketbook. If we are inclined to view with suspicion the tender expressions of solicitude for the Indian wards which have issued forth from the Congress and the Federal courts, we trust that our attitude is understandable. If there be any governmental responsibility for the plight of any of our citizens of Indian blood, then it is the responsibility of the forty-eight states collectively. We assert

that neither the Constitution nor reason afford any justification for interference with state taxation in this case.

It is, therefore, respectfully submitted that the decision of the United States Circuit Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,
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February, 1943.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 556

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, A MUNICIPAL CORPORATION, ET AL.,

Petitioners,

v.

EVELYN SEBER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

MAC Q. WILLIAMSON,
Attorney General of the State of Oklahoma;
HOUSTON E. HILL,
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SUPREME COURT OF THE UNITED STATES

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REPLY BRIEF OF PETITIONERS.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

The memorandum brief that follows was written immediately after oral argument was had in this case on Thursday, March 4, 1943, in order that it might be delivered to the printer on Thursday night, and any apparent shortcomings

may be chargeable to pressure and lack of time. We have, therefore, not had as much time for preparation as would have been desirable.

I.

The Acts in Question Are Unconstitutional.

The fundamental weakness of the Government's position is made very clear at p. 11 of *amicus curiae* brief, in the following language:

> "Even after the territories in which they lived had been organized as States, the federal power over the Indians was never seriously doubted, although its source has been a *subject of dispute*. It would seem, however, that the power is derived from *history* and *necessity*, and *might if* an *express* provision were required, be said to take its ultimate origin in the commerce clause, the treaty-making power and in the 'necessary and proper clause' of Article I. • • • "

Here then is what the Federal government asserts as the basis for congressional interference with State taxation: (1) "History and necessity"; (2) The commerce clause; (3) The treaty-making power; (4) The "necessary and proper clause" of Article I. We will deal with them in order.

1. "History and necessity." As a basis for Federal control of Indians, we have no quarrel with "history and necessity." But it should be obvious that "history and necessity" cannot afford a basis for Federal interference with State taxation—in the absence of constitutional authorization of such an extreme measure.

2. The commerce clause provides that Congress shall have power:

> "• • • to regulate commerce with foreign nations and among the several states, and with the Indian *Tribes*" (Emphasis supplied).

Observe that Congress has power to regulate commerce with Indian *Tribes*, not Indian *individuals*. The importance of this distinction cannot be over-emphasized in this case. *Never before* has it been important that this Court or other courts recognize the distinction! *Always* in the past, questions of tax exemption have involved *tribal* lands—lands *allotted* under treaties with Indian Tribes—NOT lands PURCHASED with individual funds for the benefit of individual Indians rather than the tribe as a whole. The Acts of Congress under attack here do not deal with any *Tribe* or *Tribes* of Indians. They simply deal with *individuals* who happen to have Indian blood.

The Constitution *could have* clothed Congress with the power to regulate commerce with *individual* Indians if the framers had wanted to do so, but they chose to limit the Congressional power to "Tribes." The importance of the distinction between the word "Tribe" and the word "individual" cannot be over-emphasized in this case.

Does the court wonder why this distinction has never before, in all the years of Indian litigation, been brought to its attention? The answer is that Congress has always before recognized the limitation on its power. Prior to the passage of the Acts in question here, all Congressional legislation on Indian matters has dealt with Indian Tribes rather than Indian individuals, insofar as tax exemption was concerned. Always in the past, questions of tax exemption have involved tribal lands—lands *allotted* under treaties with Indian *Tribes*—NOT lands PURCHASED with individual funds for the benefit of individual Indians rather than the tribe as a whole.

3. The treaty-making power of Congress affords no authority to Congress to pass Acts of the character here in question. No treaty is presently before us. The transactions affected by the Acts were ordinary commercial trans-

actions. Certain individual Indians, being possessed of certain private funds, did purchase certain lands. The transaction involved in the case at bar was simply a purchase of land by Wosey John Deere out of oil royalty money belonging to her, and which purports to exempt such purchased land from State taxation.

4. The "necessary and proper clause" has no application here. Since no power was delegated to Congress authorizing Congress to interfere with State taxation in a case of this character, there is no occasion for the "necessary and proper clause" to come into play.

At p. 12 of the *amicus curiae* brief occurs the following interesting statement:

> "Having in the exercise of its delegated powers [what delegated powers?] created a situation in which protection was required and having either expressly or impliedly undertaken the resultant governmental obligation to afford that protection, the federal government had the consequent authority to do all that was necessary to perform the obligation even though the Indians resided within the boundaries of the states * * *"

In answer to the above-quoted statement, we assert that nothing therein affords any basis for Federal interference with State taxation. The mere fact that the Federal government has obligations and responsibilities toward Indians does not thereby place in the Federal government any power to interfere with State taxation. The mere fact that the Federal government has "undertaken to protect" the Indians does not thereby place in the Federal government any power to interfere with State taxation. If the Federal government has incurred an obligation to protect the Indians from loss of their property at tax sale, then let Congress continue to appropriate money to pay those taxes, as

it did in Sec. 1 of Act of June 20, 1936. Congress has done this before and it can do it again.

At pp. 8 and 9 of Petitioners' Original Brief, we have dealt with the abuse of legal concepts by the courts, and particularly the concept of "Federal instrumentality." All that was said there has application with equal force to the use of such concepts as "guardianship" and "wardship", in connection with Congressional control of Indian affairs. The Constitution does not provide that Congress shall be the "guardian" of the Indians and that the Indians shall be the "wards" of the Congress. But we have no particular objection if Congress sees fit to assume burdens of guardianship without Constitutional authorization. However, we do vigorously contend that concepts not found in the Constitution—concepts such as "Federal instrumentality," "guardian," "ward"— *offer no justification for Federal interference with State taxation.*

For a critical approach to traditional constitutional concepts, we quote the following language, incorporated in *Erie v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817:

> "I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has often been advanced in judicial opinions of this court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now, erroneously, repeated the same doctrine.

But, notwithstanding the frequency with which the doctrine has been repeated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State, and to that extent, a denial of its independence."

II.

Enabling Act and Oklahoma Constitution.

Reference has been made in the *amicus curiae* brief, at pp. 13, 47, to Sec. 1 of the Oklahoma Enabling Act and Sec. 6, Art. X, Oklahoma Constitution. However, in quoting from the Enabling Act (p. 13) the government omitted some very significant language. We, therefore, quote at length:

SECTION 1. "Admission of Oklahoma and Indian Territory as State. That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided*, that *nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories* (so long as such rights shall remain unextinguished) *or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed*" (34 Stat. L. 267).

The above-quoted provision was considered in *United States* v. *Board of Com'rs of McIntosh County*, 271 Fed. 747 (affimd. 284 Fed. 103, 263 U. S. 689 [No. 178]). The following syllabi are quoted from that case:

5th Syllabus:

"'Const. Okl. art. 10, S. 6, exempting from taxation property exempt by reason of treaty stipulations existing between Indians and the government, or by federal laws during the force and effect of such treaties or laws, obviously exempts such lands only as were exempt under treaties and laws in existence when the state was admitted."

9th Syllabus:

"The provisions of the Oklahoma Enabling Act and Constitution exempting from taxation property belonging to or thereafter purchased by the United States and all Indian property exempted by existing treaties or laws do not exempt from taxation lands theretofore taxable, after their purchase by the Secretary of the Interior for a full-blood Creek Indian, to be held under the same restrictions on alienation as were imposed on the lands from which the purchase price was derived as oil royalties or proceeds of sale."

It has always been recognized that a territory—in seeking to be admitted into the Union as a State—must yield to existing vested property rights. Thus Oklahoma was bound to respect vested Indian rights to tax exemption at the time statehood was acquired.

But it has likewise always been recognized that no State can bargain away its authority in regard to property to which no vested rights as to tax immunity had attached at time of statehood. To hold otherwise would be to deprive the affected State of its right to come into the Union "on an equal footing with the original States." (*State of Oklahoma* v. *A. T. & S. F. Ry. Co.*, 220 U. S. 277, 31 S. Ct. 434.)

The Meriam Report.

The *amicus curiae* brief, at pp. 21, 22, 24, 27, 28, makes reference to the Meriam Report on Indian Administration. The Meriam Report dealt with the situation arising when allotted lands were converted into money, which money was in turn converted into more desirable land. In a situation of that character, the original allotted lands, having been sold, are thereby subjected to taxation, and the State is not seriously prejudiced. But in the case at bar, the lands were purchased out of *oil and gas royalty* money, and the original allotment continues to remain tax exempt; so that the State is entirely without compensation. With oil wells on Indian lands flowing every hour of every day and piling up restricted funds for investment in Oklahoma property, which is being taken off the tax rolls in alarming amounts, the time will shortly arrive when the governmental functions of the State and various subdivisions will be paralyzed.

IV.

Enrolled and Unenrolled Indians.

As was pointed out in our original brief, the Supreme Court of the United States has never held that purchased lands, other than those of a *tribal character* allotted under treaties with the Indians, could be rendered tax-exempt by mere *fiat* of Congress, simply because they were owned by an individual Indian, or because restricted funds of an Indian grantor were used in their purchase. Furthermore, the Supreme Court of the United States has never attempted to make any distinction between enrolled Indians and unenrolled Indians in the cases which have come before it involving the right of States to tax Indian lands for the

reason that only rights of enrolled Indian allottees were involved.

V.

Erroneous Statements in Amicus Curiae Brief.

Attention should first be called to serious inaccurate and misleading statements at pp. 32, 33, and 38 of *amicus curiae* brief.

At pp. 32, 33, *amicus curiae* says:

> "They [petitioners] say first (Pet. 19-21) that the act does not apply to lands 'purchased from trust or restricted funds' at all (although Congress used those very words) but applies only to lands purchased by the Secretary of Interior for 'landless Indians' from funds appropriated by Congress for that purpose * * *"

At p. 33, *amicus curiae* says, in italics:

> "The application of the Act of June 20, 1936, is not limited to lands purchased from funds appropriated by Congress for 'landless Indians.'"

At p. 38, *amicus curiae* says, in italics:

> "The application of the Act of May 19, 1937, is not limited to lands purchased from funds appropriated by Congress for 'landless Indians.'"

The above-quoted statements are inaccurate and irrele- . . Petitioners have never made any reference to lands purchased out of Congrssional appropriations. Petitioners' Second Proposition deals exclusively with lands purchased out of trust or restricted funds. See pp. 18, 19, 21 of Petitioners' Brief.

Conclusion.

It is, therefore, respectfully submitted that the decisi
of the United States Circuit Court of Appeals for the Ten
Circuit should be reversed.

Respectfully submitted,

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State of Oklahoma;
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No. 556

In the Supreme Court of the United States

October Term, 1912.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, A MUNICIPAL CORPORATION, *ET AL., Petitioners,*

vs.

EVELYN SEBER, *ET AL., Respondents.*

Answer to Petition for Writ of Certiorari.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1942.

No. 556.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, A MUNICIPAL CORPORATION, *ET AL.*, *Petitioners*,

vs.

EVELYN SEBER, *ET AL.*, *Respondents.*

ANSWER BRIEF TO THE PETITION FOR WRIT OF *CERTIORARI*.

Statement.

We respectfully challenge the sufficiency of the petition, together with the supporting brief, to show cause for the issuance of the writ, and ask for its dismissal, or in the alternative, for a denial of the writ.

A correct understanding of the history of the case and the issues determined may be obtained from the findings of fact and conclusions of law of the trial court (Clk. Tr. 41-50, 50-52) and from its opinion, which, although not included in the record, is reported in 31 Fed. Supp., at page 731, *et seq.* A more concise history is contained in the decision of the Honorable Circuit Court of Appeals for the Tenth Circuit (Clk. Tr. 61, *et seq.*), which is reported as *Board of County Commissioners of Creek County* v. *Seber, et al.*, 130 F. (2d) 663.

We respectfully assert that a consideration of the decision of the Circuit Court of Appeals clearly demonstrates that it is in harmony with the former decisions of this Honorable Court, which are overlooked in the statement and argument of the petitioners herein.

We here attempt to avoid a discussion of the merits, except incidentally and only in so far as we deem it necessary to show that the writ should not issue.

The Basis of Petitioners' Claim.

The petitioners present their claim to the issuance of the writ under five separate specifications of error, which they set forth at pages 10 and 11 of their supporting brief; the last three of which are unsupported by argument, and are, we believe, without support in the record in this case.

We believe that our argument can be more clearly presented by first disposing of these latter assignments, rather than by a discussion of the specifications of error in the order assigned by them.

In their third specification of error, petitioners assert (their brief, page 11):

> "The Circuit Court of Appeals erred in holding that—because Wosey John Deere owned an interest in the lands in question on January 1, 1937—respondents were entitled to recover ad valorem taxes paid on said land for the year 1937, even though neither Wosey John Deere nor the administrator of her estate were parties to the action."

We assert that the decision of the Circuit Court of Appeals upon this point (Clk. Tr. 68-69) does not sustain the basis of this contention.

We call attention to the fact that the taxes for the year 1937 were paid by respondents (Agreed Statement of Facts,

Clk. Tr. 46), and, of course, since neither Wosey John Deere, nor the administrator of her estate were interested in the event of the action, they were not necessary or proper parties thereto. Rule 19, Rules of Civil Procedure.

In addition, no such question was presented by petitioners, either by answer (Clk. Tr. 33-40), or in their statements of points for consideration on appeal (Clk. Tr. 1-3). This question not having been presented or considered in the courts below should not be examined here. *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 56 S. Ct. Rep. 269, 80 L. ed. 284.

In their fourth specification of error, petitioners assert (their brief, page 11):

> "The Circuit Court of Appeals erred in permitting respondents to recover ad valorem taxes which had been paid on the land in question more than three years before the filing of this action, such action being barred by the statute of limitations of the State of Oklahoma."

This specification is without foundation in the record in this case. The recovery was specifically limited to the payments which were made by respondents within the three-year statutory period prescribed by the statutes of the State of Oklahoma.

This is shown by the decision of the Circuit Court of Appeals, wherein it is held (Clk. Tr. 72):

> "*The contention with reference to the statute of limitations need not be noticed* since we hold that all the lands involved here were not exempt from taxation for the taxable year beginning July 1, 1936, and ending June 30, 1937, hence the taxes levied, assessed, and paid for this period, together with penalties, were lawful and not recoverable. *All other taxes assessed and paid, and held to be illegal and void, are concededly within the statute of limitations.*" (Italics ours.)

The petitioners assert in their fifth specification of error (their brief, page 11):

> "The Circuit Court of Appeals erred in upholding Federal jurisdiction in this action, in view of Section 12,665, O. S. 1931, which has the effect of requiring that actions for the recovery of illegally collected taxes shall be filed in the courts of the State of Oklahoma rather than the Federal courts."

A reading of the cited statute, which is set forth in full in an appendix to this brief, at page 8, shows that it does not purport to deprive the Federal Courts of jurisdiction of a suit of this nature.

In any event, the jurisdiction of the Federal Courts cannot be limited or defeated by the statutes of a state. *Lincoln County* v. *Luning*, 133 U. S. 529, 10 S. Ct. Rep. 363, 33 L. ed. 766; *Chilcot County* v. *Sherwood*, 148 U. S. 529, 13 S. Ct. Rep. 695, 37 L. ed. 546.

We shall present our argument and authorities in answer to petitioners' remaining specifications of error, under the following counter-propositions in *seriatim*:

Counter Proposition Number One:

> The Acts of Congress here in question are constitutional; and the decision of the Circuit Court of Appeals in so holding is in harmony with the decisions of this court.

Counter Proposition Number Two:

> The tax-immunity created by these acts is applicable to the lands here involved, and the decision of the Circuit Court of Appeals in so holding is in accord with the decisions of this court.

ARGUMENT *and* AUTHORITIES.

COUNTER PROPOSITION NUMBER ONE.

The Acts of Congress here in question are constitutional and the decision of the Circuit Court of Appeals in so holding is in harmony with the decisions of this Court.

The petitioners, in their first specification of error (their brief, page 10), assert that Section 2 of the Act of Congress of June 20, 1936 (49 Stat. 1542, 25 U. S. C. A. 412); as amended by the Act of May 19, 1937 (50 Stat. 188, 25 U. S. C. A. 412a); is unconstitutional.

The basis of this contention, as stated by them, is that Congress "cannot for the purpose of exemption from state taxation, create a 'Federal instrumentality' out of the person or property of an individual merely because such individual is possessed of a quantum of Indian Blood."

This contention finds full answer in the language of the acts in question, which, we assert, clearly demonstrates that these instrumentalities were not created for the purpose of securing an exemption from state taxation, but rather the immunity from such taxation was provided by these acts to preserve instrumentalities theretofore created under congressional authority.

The power of Congress to impose restraint upon the alienation of lands of its Indian wards cannot be doubted, whether such lands are acquired by private purchase or not. This power rests upon the dependent character of the Indians, their recognized inability to safely conduct business affairs, and the peculiar duty of the Federal government to safeguard their interests and protect them against the greed of others and their own improvidence. *Sunderland v. United States*, 266 U. S. 226, 45 S. Ct. Rep. 64, 69 L. ed. 259.

Likewise, the rule that Congress, acting within the lim-

its of the Federal Constitution, has power to exempt its instrumentalities from state taxation is too well settled to leave room for doubt. *Pittman* v. *Home Owners Loan Corp.*, 308 U. S. 21, 60 S. Ct. Rep. 15, 84 L. ed. 11; *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, 48 S. Ct. Rep. 333, 72 L. ed. 709; *United States* v. *Wright*, (C. C. A. 4) 53 F. (2d) 300, cert. den. 285 U. S. 539, 52 S. Ct. Rep. 312, 76 L. ed. 932. This rule is directly applicable to the statutory enactments here in question.

We respectfully assert that Congress had the Constitutional authority to enact the statutory provisions here in question; that they are binding upon the courts as the law of the land (*Pittman* v. *Home Owners Loan Corp., supra*), and the decision of the Circuit Court of Appeals in so holding is in accord with the decisions of this Honorable Court.

COUNTER PROPOSITION NUMBER TWO.

The tax-immunity created by these Acts is applicable to the lands here involved, and the decision of the Circuit Court of Appeals in so holding is in accord with the decisions of this Court.

The petitioners, under their second specification of error, assert that the acts in question "apply only to 'landless' Indians who had never held land prior to the purchase of property out of their restricted funds," and they say, that since respondents own other property which they inherited from their mother, the lands here involved do not fall within the immunity provided by these acts.

They do not attempt to show wherein the acts in question are susceptible of the claimed construction, but predicate this claim solely upon quoted excerpts from the statement made by the Honorable Elmer Thomas, Chairman of the Committee on Indian Affairs of the United States Senate, when the 1936 Act was under consideration.

We respectfully assert that the acts here in question do not lend themselves to this claimed construction, and that the statement relied upon by them does not sustain their claim. In any event, this statement cannot be considered for the purpose of construing the acts in question contrary to their plain terms. *Pennsylvania Railroad Co.* v. *International Coal Min. Co.*, 230 U. S. 184, 33 S. Ct. Rep. 893, 57 L. ed. 1446.

Their statement that "the 1936 Act made the exemption a personal right, limited to the person whose funds were used to purchase the lands," (their brief, page 23) finds full answer in the decision of the Circuit Court of Appeals upon this point (Clk. Tr. 68-69).

In addition, the Amendatory Act of 1937 should be considered as an aid to the construction of the 1936 Act, if there be any doubt as to the proper construction of the former statute. *Tiger* v. *Western Inv. Co.*, 221 U. S. 286, 31 S. Ct. Rep. 578, 55 L. ed. 738. Viewed in the light of this rule, there can be no doubt as to the construction of the 1936 Act.

Wherefore, Respondents most respectfully pray that the petition for writ of *certiorari* be dismissed, or in the alternative, denied.

Respectfully, submitted,

LEONARD O. LYTLE,
GEORGE H. JENNINGS,
(Of Counsel)
Sapulpa, Oklahoma,
Counsel for Respondents.

APPENDIX.

Section 12,665, Okla. Stat. 1931, is, in full, as follows:

"In all cases where the illegality of the tax
leged to arise by reason of some action from whi
laws provide no appeal, the aggrieved person sha
the full amount of the taxes at the time and in the
ner provided by law, and shall give notice to the
collecting the taxes showing the grounds of com
and that suit will be brought against the officer f
covery of them. It shall be the duty of such collecti
ficer to hold such taxes separate and apart fro
other taxes collected by him, for a period of thirty
and if within such time summons shall be served
such officer in a suit for recovery of such taxe
officer shall further hold such taxes until the final
mination of such suit. All such suits shall be brou
the court having jurisdiction thereof, and they
have precedence therein; if, upon final determi
of any such suit, the court shall determine tha
taxes were illegally collected, as not being due the
county or sub-division of the county, the court
render judgment showing the correct and legal a
of taxes due by such person, and shall issue such
in accordance with the court's findings, and if su
der shows that the taxes so paid are in excess
legal and correct amount due, the collecting officer
pay to such person the excess and shall take his r
therefor."

FILE COPY

No. 556

In the Supreme Court of the United States

October Term, 1942.

Board of County Commissioners of the County of Creek, State of Oklahoma, a Municipal Corporation; H. L. Payne, County Treasurer of the County of Creek, State of Oklahoma; W. Howard Seay, County Assessor of the County of Creek, State of Oklahoma, and W. B. Key, County Clerk of the County of Creek, State of Oklahoma, *Appellants*,

vs.

Evelyn Seber, Otherwise Known as Osharsha John, Jimmie Powshiek and Juanita Deere, Now McIntosh, *Respondents.*

BRIEF OF RESPONDENTS.

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Attorney for Respondents.

GEORGE H. JENNINGS,
Of Counsel.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1942.

No. 556

Board of County Commissioners of the County of Creek, State of Oklahoma, a Municipal Corporation; H. L. Payne, County Treasurer of the County of Creek, State of Oklahoma; W. Howard Seay, County Assessor of the County of Creek, State of Oklahoma, and W. B. Key, County Clerk of the County of Creek, State of Oklahoma, *Appellants,*

vs.

Evelyn Seber, Otherwise Known as Osharsha John, Jimmie Powshiek and Juanita Deere, Now McIntosh, *Respondents.*

BRIEF *of* RESPONDENTS.

Statement of the Case.

This action was instituted in the United States District Court for the Northern District of Oklahoma by plaintiffs below, respondents herein, who are unenrolled full-blood members of the Creek or Muskogee Tribe of Indians, to recover taxes alleged to have been paid by them under compulsion and duress, and which are alleged to have been levied by defendants below, petitioners herein, against their restricted Indian lands, in violation of Section 2 of the

Act of Congress of June 20, 1936 (49 Stat. 1542), and the amendatory Act of May 19, 1937 (50 Stat. 188); and for a declaratory judgment decreeing the tax exempt status of their lands falling within the provisions of the 1937 Act.

In order to more clearly present the issues, and for the convenience of the court, we preface our further statement of the case with the citation of the applicable statutory provisions, as follows:

The Act of Congres of June 20, 1936 (49 Stat. 1542), provides:

Section 1. "That there is hereby authorized to be appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of $25,000.00 to be expended under such rules and regulations as the Secretary of the Interior may prescribe, for payment of taxes, including penalties and interest, assessed against individually owned Indian land the title to which is held subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of an Indian, where the Secretary finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase, it would be nontaxable, and for redemption or reacquisition of any such land heretofore or hereafter sold for non-payment of taxes."

Section 2. "All lands, the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress."

The Act of Congress of May 19, 1937 (50 Stat. 18), amending Section 2 of the Act, *supra*, is as follows:

"All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be non-taxable until otherwise directed by Congress: *Provided*, that the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior; and provided further, that the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred sixty acres, or the village, town, or city property, not exceeding in cost $5,000.00, to be designated as a homestead."

Section 1 of the 1936 Act is not codified in either United States Statutes Annotated or in Federal Codes Annotated, but Section 2 of this Act is found in 5 F. C. A., Title 25, Section 412a, and the 1937 Act is found in the pocket supplement to this volume, under the same number.

Agreed Statement of Facts.

The cause was submitted to the Honorable F. E. KENNAMER, District Judge, upon an agreed statement of facts.

Inasmuch as the petitioners have filed no brief, other than their supporting brief to the petition for writ of *certiorari*, in which they have omitted specific reference to the facts involved, we set forth, in substance, the material part of the agreed statement of facts, as follows (R. 37-46):

The plaintiffs are unenrolled full-blood members of the Creek or Muskogee Tribe of Indians; the defendant, Board of County Commissioners of the County of Creek, State of

Oklahoma, is a municipal corporation, organized and existing under the laws of such state; and the defendants, H. L. Payne, W. Howard Seay and W. B. Key, are the qualified and acting County Treasurer, Assessor, and County Clerk, respectively, of such county.

Wosey John, now Deere, the mother of plaintiffs, was a full-blood member of the Creek or Muskogee Tribe of Indians, enrolled as such opposite roll number 9546 on the approved rolls of such tribe, and a large sum of money accumulated to her credit in the custody of the Secretary of the Interior from the sale of oil and gas from her restricted Indian lands.

The Secretary of the Interior invested a portion of this money in the purchase, in her behalf, of the three tracts of land which form the basis of this action; and he thereafter invested large sums in the erection of permanent improvements on such lands. One of such tracts was purchased on December 11, 1915; one on March 24, 1920; and one on December 8, 1927.

The conveyances so taken by the Secretary at the time of the purchase of such respective lands each contained the following provision of restraint (R. 14, 17, 19):

> "* * * subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described, or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification, unless made with the consent of and approved by the Secretary of the Interior."

On April 4, 1931, Wosey John, now Deere, in consideration of love and affection, made, executed and delivered

plaintiffs her certain deed in writing, thereby conveying jointly to plaintiffs the three tracks of land so purchased by the Secretary of the Interior; reserving, however, the grantor, a life estate in each.

This deed was submitted to and approved by the Secretary of the Interior on April 3, 1931, and it contained the following provision of restraint (R. 21-22):

"* * * subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described, or the title thereto, shall be of any force and effect, unless approved by the Secretary of the Interior or the restrictions from said lands are otherwise removed by operation of law."

On December 10, 1937, Wosey John, now Deere, made and delivered to plaintiffs her additional conveyance thereby conveying to them the interest reserved in the deed of March 4, 1931. This deed contained provisions of restraint identical with those contained in the former deed (R. 22-23).

On December 16, 1937, the plaintiffs, with the consent of the Secretary of the Interior, executed a certificate of tax exemption, in conformity with the 1937 Act, and selected the 80-acre tract located in Section 27 and the 7½-acre tract located in Section 36, as the property to be designated as their tax-exempt homestead under such Act of Congress (R. 24-25).

This certificate was approved by the Secretary of the Interior on March 24, 1938, and was filed in the office of the County Clerk of Creek County, Oklahoma, on April 12, 1938.

The county assessor listed each of such tracts of land for ad valorem tax purposes in Creek County for the tax

year 1936, and subsequent years and caused ad valorem taxes to be levied against the same, and caused such taxes to be extended upon the tax rolls of said county. The plaintiffs thereafter paid a part of the taxes so levied against such lands with penalties, but did not, at the time of making such payments, serve notice on the county treasurer that such taxes were being paid under protest in the manner required by the Statutes of Oklahoma. The stipulation specifically sets forth the amount of taxes levied against each tract for each respective year; the amounts paid by plaintiffs, and the dates of such payment.

The defendants claimed and asserted a lien upon such respective lands for the taxes so levied against the same for each of such years, with penalties at the rate of 12% per annum, and if the plaintiffs had not paid such taxes, with penalties, defendants would have advertised and sold such lands for the purpose of enforcing the collection of such taxes in the manner provided by the Statutes of Oklahoma for the sale and resale of lands for the collection of delinquent ad valorem taxes.

It was stipulated, as to the taxes which remain unpaid, that the defendants assert and claim a perpetual lien upon such respective lands for the amount so levied against the same, with penalties at the rate of 12% per annum; and that unless such taxes, with penalties, are paid, the defendants will, unless restrained, offer such lands for sale and will sell the same in the manner provided by the laws of Oklahoma for the sale and resale of lands for the collection of delinquent ad valorem taxes.

It was also stipulated that the defendants intend to assess the lands described in the certificate of tax exemption for ad valorem taxes for the year 1941, and future years,

and that, unless restrained, they cause ad valorem taxes to be levied against the same for such years, and assert a perpetual lien upon such lands for the amounts so to be levied, with penalties thereon, and that if the taxes so to be levied are not paid when due, the defendants will, unless restrained from so doing, offer for sale and sell such lands for the collection of such ad valorem taxes.

It was further agreed that the plaintiffs have, at all times since the year 1931, occupied the lands located in Section 27, Township 18 North, Range 11 East, as their home and homestead.

The Judgments of the Courts Below.

The trial court made findings of fact conforming to the agreed statement of facts, and made conclusions of law in which it was concluded in substance (Tr. 46-48):

A. That the three tracts of land involved in this action were exempt from taxation by the State of Oklahoma, and its municipal subdivisions of government, for the tax years 1936 and 1937 under the provisions of the 1936 Act; and that the lands described in the certificate of tax exemption were exempt from such taxation for the years 1938, 1939 and 1940, under the provisions of the 1937 Act, and are now and will continue to be so exempt from such taxation so long as the same are owned by and remain the homestead of the plaintiffs, and their restricted heirs, and until restrictions against alienation are removed in the manner provided by law;

B. That the taxes so levied by defendants for the years involved were imposed in violation of such Acts of Congress and were illegal and void; and the payments made by plaintiffs were made under compulsion and duress, and were

made by them to quiet their title against the illegal and void tax liens asserted by defendants and to prevent the accumulation of penalties and the sale of their lands for the collection of such illegal and void taxes.

C. That plaintiffs are entitled to recover the portion of such illegal taxes so paid by them, and to have the portion thereof which remains unpaid cancelled and set aside; and are entitled to a declaratory judgment decreeing the lands designated in the certificates of homestead exemption to be exempt from taxation for the tax year 1940, and so long thereafter as such lands belong to and remain the homestead of plaintiffs, and their restricted heirs, and until restrictions against alienation are removed in the manner provided by law.

A formal decree was entered in the cause conforming to the conclusions of law (R. 48-50); to reverse which an appeal was taken by petitioners herein to the Circuit Court of Appeals for the Tenth Circuit.

Upon such appeal the judgment of the trial court was modified in that it was there held that the immunity from taxation created by the Act of June 20, 1936, *supra*, did not become effective so as to exempt the lands in question from taxation until January 1, 1937. In all other respects the judgment of the trial court was affirmed.

The judgment of the Honorable Circuit Court of Appeals for the Tenth Circuit is reported as *Board of County Commissioners of Creek County* v. *Seber, et al.*, 130 F. (2d) 663.

The Petitioners' Specifications of Error.

Although the petitioners have set forth five separate specifications of error, at pages 10 and 11 of their supporting brief to the petition for writ of *certiorari*, yet, the last three of these assignments are unsupported by argument, and are, as we believe, without support in the record in this appeal.

We refer to our former brief in answer to these last named assignments of error.

We shall present our argument and authorities in answer to the remaining specifications of error separately under the following counter-propositions:

COUNTER-PROPOSITION NUMBER ONE—

The Acts of Congress here in question are Constitutional;

COUNTER-PROPOSITION NUMBER TWO—

The lands involved in this action fall within the exemption created by the Acts of Congress, supra, and such lands were and are immune from taxation by the State of Oklahoma, and its municipal subdivisions of government.

ARGUMENT *and* AUTHORITIES.

COUNTER-PROPOSITION NUMBER ONE.

The Acts of Congress Here in Question Are Constitutional.

The petitioners, in their first specification of error (their brief, page 10), assert that Section 2 of the Act of Congress of June 20, 1936 (49 Stat. 1542, 25 U. S. C. A. 412), as amended by the Act of May 19, 1937 (50 Stat. 188, 25 U. S. C. A. 412a), is unconstitutional.

The basis of this contention, as stated by them, is that Congress "cannot for the purpose of exemption from state taxation, create a 'Federal instrumentality' out of the person or property of an individual merely because such individual is possessed of a quantum of Indian blood."

This contention finds full answer in the language of the acts in question, which, we assert, clearly demonstrates that these instrumentalities were not created for the purpose of securing an exemption from state taxation, but rather the immunity from such taxation was provided by these acts to preserve instrumentalities theretofore created under congressional authority.

The power of Congress to impose restraint upon the alienation or incumbrance of lands of its Indian wards cannot be doubted, whether such lands are acquired by private purchase or not. This power rests upon the dependent character of the Indians, their recognized inability to safely conduct business affairs, and the peculiar duty of the Federal Government to safeguard their interests and protect them against the greed of others and their own improvidence. *Sunderland v. United States*, 266 U. S. 226, 45 S. Ct. Rep. 64, 69 L. ed. 259.

Likewise, the rule that Congress, acting within the limits of the Federal Constitution, has power to exempt its instrumentalities from state taxation is too well settled to leave room for doubt. *Pittman* v. *Home Owners Loan Corp.*, 308 U. S. 21, 60 S. Ct. Rep. 15, 84 L. ed. 11; *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, 41 S. Ct. 243, 65 L. ed. 577; *Bank of New York* v. *New York County*, 9 Wall. 26, 19 L. ed. 60; *Thomson* v. *United Pacific Railway Co.*, 9 Wall. 579, 19 L. ed. 792.

This same rule was announced in *Shaw* v. *Gibson-Zahniser Corp.*, 276 U. S. 575, 48 S. Ct. 333, 72 L. ed. 790, wherein it was held that, although lands of the class involved in this appeal were not exempt from state taxation in the absence of legislation by Congress to that effect, yet that it was within the power of Congress by appropriate legislation to grant such immunity. This rule is announced in that case as follows:

> "*There are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks.* See *Goudy* v. *Meath*, 203 U. S. 146, 51 L. ed. 130, 132, 27 Sup. Ct. Rep. 48; *Gromer* v. *Standard Dred. Co.*, 224 U. S. 362, 371, 56 L. ed. 801, 805, 32 Sup. Ct. Rep. 499; *Fidelity & D. C.* v. *Pennsylvania*, 240 U. S. 319, 323, 60 L. ed. 664, 668, 36 Sup. Ct. Rep. 298; *Union P. R. Co.* v. *Peniston*, 18 Wall. 5, 21 L. ed. 787; *Choctaw O. & G. R. Co.* v. *Mackey*, 256 U. S. 531, 537, 65 L. ed. 1076, 1080, 41 Sup. Ct. Rep. 582; *Central P. R. Co.* v. *California*, 162 U. S. 91, 126, 40 L. ed. 903, 915, 16 Sup. Ct. Rep. 766. *These lands we take to be of that character.*"

The same rule is applied in *United States* v. *Wright*, (C. C. A. 4) 53 F. (2d) 300, *certiorari* denied 285 U. S. 539, 52 S. Ct. 312, 76 L. ed. 932.

In that case the court held that the provisions of the Act of Congress of June 4, 1924 (43 Stat. 376), exempting from state taxation lands belonging to the Eastern Band of Cherokee Indians, conveyed to the United States in trust, until division and allotment had been completed and restrictions on alienation removed, was constitutional, although the Indian's title had been acquired from the state, and although the lands had been subject to state taxation at all times prior to the enactment of the statute there in question.

The petitioners do not challenge the correctness of the rule announced in the above cited cases, and make no effort to show wherein this rule is not applicable to the Acts of Congress here in question.

On the other hand, they rely solely upon the decision in *Helvering* v. *Mountain Products Co.*, 303 U. S. 376, 58 S. Ct. 623, 82 L. ed. 907, to support their contentions in this appeal.

We respectfully assert that a consideration of the decision in that case clearly demonstrates that it is not authority here, for in that case no question was presented concerning the constitutional power of Congress to grant immunity from taxation to an instrumentality of the Federal Government.

We respectfully assert that Congress had the Constitutional authority to enact the statutory provisions here in question; that they are binding upon the courts as the law of the land (*Pittman* v. *Home Owners Loan Association, supra*), and the decision of the Circuit Court of Appeals in so holding is in accord with the decisions of this Honorable Court, and should be sustained.

COUNTER-PROPOSITION NUMBER TWO.

The lands involved in this action fall within the exemption created by the Acts of Congress, *supra*, and such lands were and are immune from taxation by the State of Oklahoma, and its municipal subdivisions of government.

The petitioners contend that the lands involved in this appeal do not fall within the exemption created by the Acts of Congress, *supra*, for the reasons assigned by them, in substance: *(a)* Because the acts "apply only to a 'landless' Indian who never held land prior to the purchase of property for him out of his restricted funds;" and *(b)* because such lands were purchased with the restricted funds of respondents' mother, rather than with their own restricted funds.

On the other hand, it is our contention that the language of each of these acts is plain and unambiguous, and that it was the intention of Congress, by the passage of the 1936 Act to exempt from state taxation all lands which had theretofore been purchased in behalf of restricted Indians with restricted funds where the title to such lands is held subject to valid restrictions against alienation or encumbrance, and it was the intention of Congress, by the passage of the 1937 Act, to exempt all homesteads which fall within the same classification.

It is our position, therefore, that the test to be applied in determining whether or not the lands involved in this action fall within the ambit of the Acts of Congress, *supra*, is to determine whether or not the provisions contained in the deed executed to appellees, restraining them from alienating or encumbering these lands are valid or invalid. If these provisions are valid and the appellees are lawfully restrained from alienating or encumbering the lands, except

with the consent and approval of the Secretary of the Interior, then the lands fall within the terms of the acts, *supra*, and are nontaxable. If, on the other hand, these provisions are invalid, and the appellees have not been lawfully restrained from alienating or encumbering the lands, then such lands are not affected by the Acts of Congress, *supra*, and they are, and have been subject to ad valorem taxation by the State of Oklahoma, and its municipalities during the years involved in this appeal.

In this connection, we assert that it must be conceded that the royalties which accrued to the credit of Wosey John, now Deere, in the custody of the Secretary of the Interior were impressed with the same restrictions as were the lands from which they were derived. *Mott* v. *United States*, 283 U. S. 747, 51 S. Ct. 642, 75 L. ed. 1385; *Parker* v. *Richard*, 250 U. S. 235, 39 S. Ct. 442, 63 L. ed. 954; *United States* v. *Thurston County*, (C. C. A. 8) 143 Fed. 287; *United States* v. *Brown*, (C. C. A. 8) 8 F. (2d) 654. And it must be conceded that the Secretary of the Interior was empowered to require, as a condition to his approval of the investments in her behalf, that there be included in the deeds to her provisions restraining the alienation or encumbrance of such lands without his consent and approval. *Sunderland* v. *United States*, 266 U. S. 226, 45 S. Ct. 64, 69 L. ed. 259; *United States* v. *Goldfeder*, (C. C. A. 10) 112 F. (2d) 615.

Therefore, these lands were restricted Indian lands on March 4, 1931, the date upon which they were conveyed to the respondents by their mother, and they were so restricted on April 3rd, 1931, the date upon which such conveyance was approved by the Honorable Secretary of the Interior.

The Secretary having power to withhold his approval of such conveyance to respondents, had power to require

as a condition to his approval the inclusion in such deed of the provision restraining them, and their heirs, from alienating or encumbering such lands, except with his consent and approval. *Mott* v. *United States*, 283 U. S. 747, 51 S. Ct. 642, 75 L. ed. 1385; *Sunderland* v. *United States*, 266 U. S. 226, 45 S. Ct. 64, 69 L. ed. 259; *United States* v. *Thurston County*, (C. C. A. 8), 143 Fed. 287; *United States* v. *Goldfeder*, (C. C. A. 10) 112 F. (2d) 615.

It is therefore apparent that the provision restraining respondents and their heirs, from alienating or encumbering the lands involved herein, except with the consent and approval of the Secretary of the Interior, is valid; and for this reason, we assert that the lands involved in this case are Federal instrumentalities and fall within the classification of tax-exempt lands as defined by the Acts of Congress, *supra*.

The petitioners rely solely upon quoted excerpts from the statement made by the Honorable Elmer Thomas, Chairman of the Committee on Indian Affairs of the United States Senate, at the time the 1926 Act was under consideration, for support of their contention that the acts in question "apply only to a 'landless' Indian who had never held land prior to the purchase of property for him out of restricted funds."

We respectfully assert that the acts in question do not lend themselves to this claimed construction, and that the statement relied upon by them does not sustain their claim. In any event, this statement cannot be considered for the purpose of construing the acts in question contrary to their plain terms. *Pennsylvania Railroad Co.* v. *International Coal Min. Co.*, 230 U. S. 184, 33 S. Ct. 893, 57 L. ed. 1446.

The petitioners tender no argument in support of their statement that the immunity created by the acts in question do not apply to the lands involved in this appeal because such lands were purchased with the restricted funds of respondents' mother, rather than with their own restricted funds.

If there is any ambiguity in the language used in the 1936 Act, or any doubt as to the meaning to be ascribed thereto, it is only because of the use of the term "purchased out of the trust or restricted funds of said Indian." This has not been poinfed out or relied upon by petitioners in support of their contention.

A consideration of the 1937 Act discloses that this term is omitted from its text, and instead it employs the following language, without qualification:

> "All homesteads heretofore purchased out of trust or restricted funds of individual Indians are hereby declared to be instrumentalities of the Federal Government, and shall be non-taxable, until otherwise directed by Congress * * *."

The language of this act is plain and unambiguous.

This statute should be considered in determining the intent of Congress in the passage of the 1936 Act, if there be any doubts as to the legislative intent or the proper interpretation to be given to that act. *Tiger* v. *Western Investment Company*, 221 U. S. 286, 55 L. ed. 73.

However, we assert that the legislative intent is clearly expressed in each of the statutes under consideration, and that the exemption granted cannot be limited or restricted in the manner contended for by petitioners. We further assert that the above quoted language used in these respective statutes was employed by Congress solely to identify

the type or class of lands so declared to be Federal instrumentalities and to distinguish this classification of property from allotted and inherited lands, and from other lands acquired under congressional authority in behalf of individual Indians.

In this connection we call attention to the fact that the Act of Congress of May 10, 1928 (45 Stat. 495), provided for the exemption from taxation of allotted and inherited lands of restricted members of the Five Civilized Tribes, and that other acts have been passed by Congress dealing with the same class of property belonging to individual members of other tribes, and that Congressional authority has also been given for the acquisition of other property in behalf of individual Indians.

The 1936 Act received the consideration of the Honorable Stanley Reed, Acting Attorney General, prior to the passage of the 1937 Act, and in an opinion rendered to the Secretary of the Interior under date of February 13, 1937, in holding that this statute was applicable to property acquired for members of the Osage Tribe of Indians in Oklahoma; in the same manner and to the same extent that it is applicable to members of other tribes, he said:

> "The language of the 1936 Act is clear and unambiguous. * * * The obvious purpose of the Act of Congress is to make non-taxable lands of all Indians purchased out of trust or restricted funds and restricted to alienation or encumbrance."

This opinion is reported in Vol. 38, O. A. G., at page 577, and is set forth in full in an appendix to this brief, at page 20, *et seq.*

This administrative interpretation is entitled to great weight, and is not to be overturned unless clearly wrong,

or a different construction is plainly required. *Blanset* v. *Carden*, 256 U. S. 319, 41 S. Ct. 519, 65 L. ed. 950.

In this connection we call attention to the fact that when the certificate of tax exemption which was executed by the respondents covering the lands involved in this appeal was presented to the Secretary of the Interior for his approval, or rejection, as required by the 1937 Act, it was incumbent upon him to determine whether or not these lands came within the exemption created by the statute here in question. The approval of this certificate (R. 24) constitutes an affirmative finding by him that these lands do in fact come within the exemption so created.

This administrative construction is entitled to the same respectful consideration as the opinion of the Attorney General, *supra*.

If however, there is any doubt as to the legislative intent in the enactment of the statutes under construction, that doubt must be resolved in favor of the appellees, under the rule announced by the Supreme Court in *Choate* v. *Trapp*, 224 U. S. 665, 675, 32 S. Ct. 565, 56 L. ed. 941, in the following language:

> "But in the Government's dealings with the Indians, the rule is exactly the contrary. The construction, instead of being strict is liberal, doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people who are wards of the Nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized without exception, for more than a hundred years, and has been applied to tax questions."

We therefore respectfully assert that the lands involved in this appeal fall within the exemptions created by the

Acts of Congress, *supra*, and that the decision of the Circuit Court of Appeals in so holding is correct, and should be affirmed.

Conclusion.

We most respectfully assert that it was within the Constitutional power of Congress to enact the statutes here in question; that the respondents' lands fall within the exemption so created; and that the decision of the Honorable Circuit Court of Appeals for the Tenth Circuit in so holding is correct, and should be in all things approved and confirmed.

Respectfully submitted,

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Attorney for Respondents.

GEORGE H. JENNINGS,
Of Counsel.

APPENDIX.

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES.

Applicability of Act of June 20, 1936, to Members of Osage Tribe of Indians in Oklahoma.

February 13, 1937.

THE SECRETARY OF THE INTERIOR.

My Dear Mr. Secretary: Reference is made to your letter of January 4, 1937, in which you request my opinion as to whether the Act of June 20, 1936, c. 622, 49 Stat. 1542, is applicable to individual members of the Osage Tribe of Indians in Oklahoma.

That Act, entitled "An Act to Relieve Restricted Indians Whose Lands Have Been Taxed or Have Been Lost by Failure to Pay Taxes, and for Other Purposes," reads as follows:

> "That there is hereby authorized to be appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of $25,000.00, to be expended under such rules and regulations as the Secretary of the Interior may prescribe, for payment of taxes, including penalties and interest, assessed against individually owned Indian land the title to which is held subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of an Indian, where the Secretary finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase it would be nontaxable, and for redemption or reacquisition of any such land heretofore or hereafter sold for nonpayment of taxes.

"Sec. 2. All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government, and shall be nontaxable until otherwise directed by Congress."

Section 1 of the Act authorizes the use of Federal funds for payment of taxes on certain classes of Indian lands and for redemption or reacquisition of such lands sold for nonpayment of taxes. Section 2 exempts from taxation lands held by an Indian subject to restriction against alienation or encumbrance and purchased out of trust or restricted funds. If thus appears that the statute deals with certain classes of Indian *lands* without restriction as to the classes of *Indians* to which it shall apply, and no particular tribe of Indians is mentioned. Hence, members of the Osage tribe of Indians in Oklahoma are entitled to the relief afforded by the Act to the same extent as the members of any other tribe of Indians unless they are excluded therefrom by other legislation.

It is my understanding that the Act of June 20, 1936, is the only legislation enacted by Congress dealing with the use of Federal funds for the purposes specified in Section 1 of that Act. It follows, therefore, that the provisions of that section are applicable to members of the Osage tribe as well as to members of other Indian tribes.

However, in determining whether the provisions of Section 2 of the Act are applicable to the Osage Indians, it is necessary to examine certain prior legislation having to do with the taxability of lands belonging to members of the Osage tribe.

Section 1 of the Act of March 2, 1929, c. 493, 45 Stat. 1478, provides in part:

> "Homestead allotments of Osage Indians not having a certificate of competency shall remain exempt from taxation while the title remains in the original allottee of one-half or more Osage Indian blood and in his unallotted heirs or devisees of one-half or more of Osage Indian blood until January 1, 1959: *Provided*, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres."

It is obvious that the land exempted from taxation by the main clause of this enactment is limited to homestead allotments. Considering the language of the provision as a whole, it seems clear that the purpose of the main clause is to exempt from taxation homestead allotments generally, and that the purpose of the proviso is merely to limit the amount of such homestead land that the individual Indian may hold exempt from taxation. The restriction of the proviso is made to apply only to allottees, etc., mentioned in the main provision, and there would seem to be no reason why the land referred to in the proviso should not likewise be limited to homestead allotments.

Since, therefore, the 1929 statute is concerned with homestead allotments and that of 1936, with lands purchased with restricted or trust funds and restricted as to alienation or encumbrance, the earlier statute is not affected by the later, and they may operate in entire harmony.

The other legislation to be considered is the Act of February 27, 1925, c. 359, 43 Stat. 1008. Section 1 of that Act, among other things, authorizes the purchase of "real estate" and various other kinds of property with restricted

or trust funds of members of the Osage tribe of Indians in Oklahoma. Section 3 provides in part:

> "Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth, shall not be subject to the lien of any debt, claim, or judgment *except taxes*, or be subject to alienation, without the approval of the Secretary of the Interior." (Italics supplied.)

It is evident from an examination of the whole statute that the property comprehended in the language "Property of Osage Indians * * * purchased as hereinbefore set forth * * *" is that purchased pursuant to the above-mentioned provision of Section 1, which expressly includes real estate. The provision that the designated property shall not be subject to the lien of any debt, claim or judgment *except taxes* implies that such property shall be subject to taxation. By the terms of the statute, therefore, the lands of Osages not having certificates of competency purchased out of restricted or trust funds are taxable. The question thus arises whether this statutory provision is affected by Section 2 of the Act of June 20, 1936, hereinbefore set out.

The language of the 1936 Act is clear and unambiguous. It declares that "All lands the title to which is now held by *an Indian* subject to restrictions * * * heretofore purchased out of trust or restricted funds of *said Indian* * * * shall be nontaxable * * *." (Italics supplied.) The obvious purpose of the Act is to make nontaxable, lands of *all* Indians purchased out of trust or restricted funds and restricted as to alienation or encumbrance. The statute is clearly a relief measure, and there is no apparent reason why the Congress should desire to exclude any particular tribe of Indians from the relief afforded. The earlier Act does not make, and does not purport to make, the lands in

question taxable. It merely exempts the lands from certain liens and makes it clear that the exemption does not extend to the lien of taxes, to which the lands are ordinarily, and were at that time, subject. There is no conflict between the two statutes. The former exempts a certain class of lands from certain liens not including tax liens, and the latter renders such lands non-taxable.

For the reasons stated, it is my opinion that the Act of June 20, 1936, is applicable to members of the Osage Tribe of Indians in Oklahoma in the same manner and to the same extent that it is applicable to members of other Indian tribes.

Respectfully,

STANLEY REED,
Acting Attorney General.

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MAR 3 1943
CHARLES ELMORE

No. 556

In the Supreme Court of the United States

OCTOBER TERM, 1942

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, A MUNICIPAL CORPORATION, ET AL., PETITIONERS

v.

EVELYN SEBER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES, AMICUS CURIAE

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No. 556

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, ET AL., PETITIONERS

v.

EVELYN SEBER ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES, AMICUS CURIAE

OPINIONS BELOW

The opinion of the district court is not included in the record but is reported 38 F. Supp. 731. The opinion of the circuit court of appeals (R. 56–67) and the dissenting opinion (R. 67–99) are reported 130 F. (2d) 666.

JURISDICTION

The judgment of the circuit court of appeals was entered September 2, 1942 (R. 99–100). The petition for a writ of certiorari was filed November

30, 1942, and granted January 11, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether lands purchased by the Secretary of Interior for a full-blood Creek Indian with the royalties from leases of her allotted land, and subsequently conveyed to her children subject to the reservation of a life estate, none of which could be conveyed or encumbered without approval of the Secretary, were exempt from Oklahoma real estate tax for 1937 by virtue of the Act of June 20, 1936.

2. Whether homestead lands purchased by the Secretary of Interior for a full-blood Creek Indian with royalties from leases of her allotted land, which were subject to restrictions against alienation or encumbrance without the approval of the Secretary and which with his approval were subsequently conveyed to her full-blood Indian heirs subject to like restrictions, are exempt from Oklahoma real estate tax by virtue of the Act of June 20, 1936, as amended by the Act of May 19, 1937.

3. Whether the Acts of June 20, 1936, and May 19, 1937, so applied, are constitutional.

STATUTES INVOLVED

The Act of June 20, 1936, 49 Stat. 1542, and the Act of May 19, 1937, 50 Stat. 188, which amended the earlier Act, are set forth in the Appendix, pp. 54–55, *infra*.

STATEMENT

Prior to 1931 the Secretary of the Interior purchased three tracts of land in Creek County, Oklahoma, for Wosey John Deere, an enrolled, full-blood member of the Creek Tribe of Indians. The purchase price was paid out of royalties from an oil and gas lease of her allotted, restricted land. She was given title to the land purchased, subject to a condition against alienation or encumbrance without approval of the Secretary (R. 14–16, 16–18, 18–20). In 1931, with the approval of the Secretary of the Interior, she conveyed the fee to her children, Evalin Seber, Jimmie Poesheik, and Juanita Deere, subject to a like condition against alienation or encumbrance without approval of the Secretary; but she reserved a life estate (R. 21–22).

Until enactment of the Act of June 20, 1936, 49 Stat. 1542, the lands were subject to Oklahoma real estate taxes.[1] By Section 2 of that Act Congress provided:

> All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of the trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be

[1] *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U. S. 575.

nontaxable until otherwise directed by Congress.

Nevertheless, all three lots were continued on the tax rolls of Creek County and taxes for the year 1937 were levied and assessed upon the lands.

On May 19, 1937, Section 2 of the Act of June 20, 1936, was amended to provide that all restricted homestead lands theretofore purchased with restricted funds should be tax exempt; and the amendment also provided for the designation of lands as homestead (see Appendix, p. 55 *infra*). On December 10, 1937, Wosey John Deere conveyed her life estate to her three children so that they became full owners subject to a restriction against alienation or encumbrance without approval of the Secretary (R. 22–24). Thereafter, the children with the approval of the Secretary designated the county tracts "as a tax-exempt homestead," pursuant to the amendment to Section 2 of the Act of June 20, 1936 (R. 24–26). Nevertheless, taxes for the years 1938–1940 were assessed against the country as well as the city tracts.

To avoid accumulation of penalties and interest and a sale of the land for taxes, the children paid a large portion of the taxes (R. 43–44, 47) and brought this action for recovery and for a declaration that the homestead land was immune from taxation by the State (R. 5–13). The district court held that all the lands were exempt from 1937 taxes and that the lands designated as home-

stead were exempt from taxes for 1938 and subsequent years (R. 48–50). The circuit court of appeals affirmed (R. 56–67, 99–100).[2]

SUMMARY OF ARGUMENT

I

The original Act of June 20, 1936, declared tax-exempt "all lands the title to which is held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian * * *." In 1937 title to a freehold life estate in the lands in question was held by Wosey John Deere with the remainder in her children in fee, both subject to restrictions against alienation or encumbrance except with the approval of the Secretary; the lands had theretofore been purchased with the restricted funds of Wosey John Deere. Therefore, if the Act is constitutional, the lands in question were exempt from the 1937 tax.

[2] The district court also held all the lands exempt from 1936 taxes but the circuit court of appeals reversed the judgment on this point on the ground that the taxes were assessed as of January 1, 1936, before enactment of the Act of June 20, 1936 (R. 64–67, 100). It adhered to this ruling in *Muskogee County* v. *United States*, decided January 6, 1943. No cross-petition for certiorari has been filed in the instant case so that for present purposes we accept the ruling as correct.

There is no warrant for any interpolation limiting the exemption to lands purchased for so-called "landless Indians" who had never been allotted tribal lands. At one time restricted lands purchased with Indian trust funds were assumed to be tax exempt, and many Indians had been encouraged to make such purchases out of proceeds from the sale or lease of their allotted lands. Subsequent decisions proved this view to be wrong. The reports of both the House and Senate Committees show that the purpose of the Act was to give all such lands theretofore purchased the tax exempt character which they had mistakenly been assumed to possess. The subsequent legislative history confirms this view.

Likewise, there is no basis for the suggestion that Wosey John Deere did not hold "title" to the lands within the meaning of the Act because she had conveyed a future interest to her children. She held the dominant life estate and, under Oklahoma law, was liable for the tax. She held the only "title," therefore, with which an act granting a tax exemption would be concerned.

II

The homestead lands designated by the children of Wosey John Deere fall within the exemption granted by the Act of May 19, 1937. That Act declares non-taxable "all homesteads, heretofore purchased out of trust or restricted funds of individual Indians * * * : *Provided*, That the title to such homesteads shall be held subject to

restrictions * * *." The lands were properly designated as homesteads, were purchased from the individual funds of Wosey John Deere, and are held subject to the restrictions required.

The words of the amended Act make it clear that the exemption attaches to the lands in the hands of subsequent holders (if they hold subject to restrictions) as well as in the hands of the original purchaser. Whatever the meaning of the original Act, there is nothing in reason, in the legislative history, or in authority, to show that under the amended Act, contrary to the plain meaning of its words, the exemption was intended to be personal. On the contrary, it has been customary for Congress to make tax exemptions run with the land.

III

Congress has the unquestioned power to protect Indian lands, individual as well as tribal, against all forms of interference of private persons or state officials. Equally clear is the power of Congress to protect and preserve the operations of the federal government against interference by State taxation. By virtue of this power it has the equally well-established authority to exempt from State taxation lands allotted in severalty to individual Indians out of tribal property which are held by them subject to restrictions against alienation or encumbrance. Such

lands are federal instruments in a very real sense; by dividing the ownership and control, Congress has both protected the Indian's property and made provision for his support and education.

In regulating Indian affairs the federal government is not, however, limited to preserving the property which formerly belonged to the Tribes. It may develop or convert the restricted, allotted lands, which were formerly tribal property, and may use the proceeds to acquire other property. Lands purchased out of the proceeds and held by the federal government and the Indian under an arrangement similar to the holding of the restricted, alloted lands are equally the implements of federal policy; they too are used to perform the duty of the federal government to protect, support, and educate its Indian wards. Since the federal power extends so far and since the purchased lands are federal implements, the protective power must also reach them. The propriety of its exercise in view of its repercussions upon the revenues of a State is a question for Congress. A similar question arises whenever the federal government broadens its activities and acquires new property formerly subject to State taxation.

ARGUMENT

The instant case presents the narrow questions, (1) whether Congress has attempted to exempt

from tax all the lands (later only the homesteads) of Indians purchased with their trust or restricted funds and held by them subject to a restriction against alienation or encumbrance except with the approval of the Secretary, and (2) whether Congress has the constitutional authority to grant such an exemption. But although the Acts deal only with lands acquired for Indians with their trust or restricted funds, and not with Indian property generally, the scope of the Acts and their constitutionality must be considered in the light of their function in meeting Indian problems. Therefore, in order that the place of these Acts may be apparent, we shall, at the outset, review the general outlines of the legislation and judicial decisions concerning Indian property and the Government's relationship to it, out of which the legislation in issue developed.

I

THE BACKGROUND OF THE ACTS OF JUNE 20, 1936, AND MAY 19, 1937

The development and source of the federal power over Indian affairs.—The relationship of the federal government to the Indians and its control over their property have developed gradually. In early times, the tribes were recognized as separate but dependent nations, free from control of the States. See, generally, *Cherokee Nation* v. *Georgia*, 5 Peters 1; *Worcester* v. *Georgia*, 6 Peters 515; *Kansas Indians*, 5 Wall. 737; *New York In-*

dians, 5 Wall. 761. The federal government dealt with them by treaties under Article II, Section 2, and, in general, regulated them by legislation only to control intercourse between them and the whites, pursuant to Article I, Section 8, clause 3 (the power "To regulate Commerce * * * with the Indian tribes"). As the Constitutional power vested in Congress over commerce with foreign nations had been construed to cover commerce with individual foreigners, so the power of Congress with Indian tribes was held to include all forms of trade and intercourse with individual Indians. *United States* v. *Holliday*, 3 Wall. 407, 417. From earliest times, this authority was exercised with special vigor in respect to the chief property which the Indians had to trade, their land. (Act of July 22, 1790, 1 Stat. 137; Indian Trade and Intercourse Act of June 30, 1934, 4 Stat. 729). It was exercised to protect Indian lands, individual or tribal, against all forms of alienation or encumbrance, voluntary or involuntary, not expressly permitted by treaty or statute. (See *Worcester* v. *Georgia*, *supra*; *Kansas Indians*, *supra*; *United States* v. *Candelaria*, 271 U. S. 432; *Goodell* v. *Jackson*, 20 Johns 693 at 722–723, 729.

The expansion of white settlements, the Indian wars and subsequent treaties, and the removal of the Indians to the West and then to reservations, evoked further extension of federal control; but since the Indians, in general, lived on

the public domain in federal territory those exercises of federal power which could not be justified under express constitutional provisions could be supported upon the theory expounded by Chief Justice Marshall and Chief Justice Taney that power to legislate for territory within the jurisdiction of the United States must reside in the federal government because no State possessed it. See *American Ins. Co.* v. *Canter*, 1 Peters 511, 542; *United States* v. *Rogers*, 4 How. 566, 572.

Even after the territories in which they lived had been organized as States, the federal power over the Indians was never seriously doubted, although its source has been a subject of dispute. It would seem, however, that the power is derived from history and necessity, and might, if an express provision were required, be said to take its ultimate origin in the commerce clause, the treaty-making power and in the "necessary and proper clause" of Article I. As a result of constant pressure to open new lands, the federal government exercised its war and treaty-making powers in such a way as, on the one hand, to secure repeated cessions of Indian lands and, on the other, to assume the governmental duty[3] of affording the Indians, an uneducated and de-

[3] *Barker* v. *Harvey*, 181 U. S. 481, 492; *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 509, and cases cited; *Choctaw and Chickasaw Nations* v. *United States*, 75 Ct. Cls. 494.

pendent people, protection against the selfishness of others and their own improvidence. For example, in the case of the Creek Tribe, members of which are here involved, a chief element in the Treaty of August 7, 1790, 7 Stat. 35, and in the 25 subsequent treaties (see Cohen, *Handbook of Federal Indian Law*, (1942), p. 464) was the undertaking to protect Creek property against interference. Having in the exercise of its delegated powers created a situation in which protection was required and having either expressly or impliedly undertaken the resultant governmental obligation to afford that protection, the federal government had the consequent authority to do all that was necessary to perform the obligation even though the Indians resided within the boundaries of the States. Cf. *Missouri* v. *Holland*, 252 U. S. 416. This rationale was summarized by Mr. Justice Miller in *United States* v. *Kagama*, 118 U. S. 375, 384.

> From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

But whatever its source, the existence of federal power to regulate and protect the Indians and

their property against all interference is beyond dispute. *Cherokee Nation* v. *Georgia*, 5 Peters 1; *Worcester* v. *Georgia*, 6 Peters 515; *United States* v. *Kagama*, 118 U. S. 375; *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 568; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *United States* v. *Sandoval*, 231 U. S. 28; *Brader* v. *James*, 246 U. S. 88; *United States* v. *McGowan*, 302 U. S. 535.

Moreover, the existence of federal authority over Indians and their property was recognized by Oklahoma when she became a State in 1906. The Oklahoma Enabling Act provided that the United States should retain (34 Stat. 267–268):

> the authority * * * to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this [Enabling] Act had never been passed.

By its acceptance Oklahoma conceded that the federal government had plenary power to regulate and protect the property of its Indian wards from any interference to the same extent as before statehood was conferred (*Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309; *Ex parte Webb*, 225 U. S. 663; compare *United States* v. *Sandoval*, 231 U. S. 28) and, since then, she has recognized the power of the federal government to manage and legislate with respect to Indian property within her bound-

aries (*Gleason* v. *Wood*, 28 Okla. 502, 506, reversed, 224 U. S. 679; *McIntosh* v. *Dill*, 86 Okla. 1; *Wynn* v. *Fugate*, 149 Okla. 210).

Embraced within the broader power there was, of course, the power to hold and manage Indian property, to change its form, to lease it, to allot it in severalty, to give it to the Indian outright or subject to restrictions, and to resume control even though complete dominion had previously been released. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Brader* v. *James*, 246 U. S. 88; *Sunderland* v. *United States*, 266 U. S. 226. However, it is chiefly with the allotment of property in severalty and the power of the federal government over the allotted lands and their proceeds that we are presently concerned.

Restricted, Allotted Lands.—The General Allotment Act of 1887, 24 Stat. 388, although it had predecessors of limited application,[1] marked a change in the policy of the federal government toward Indian property. Previously, most Indian property was held by Tribes and not by individ-

[1] For such treaties and statutes, see Cohen, *Handbook of Federal Indian Law*, pp. 206–207. The history of Indian land tenure with emphasis on the allotment policy and its defects is exhaustively set forth in Kinney, *A Continent Lost—A Civilization Won* (1937). A more critical study is found in D. S. Otis, *History of the Allotment Policy*, Hearings, Committee on Indian Affairs, 73d Cong., 2d Sess., on H. R. 7902. With reference to the Five Civilized Tribes, see Debo, *And Still the Waters Run* (1940).

uals; with it we are not presently concerned except to point out that Indian property was beyond the jurisdiction of a state to tax even though it was located within her boundaries. *Kansas Indians*, 5 Wall. 737; cf. *Worcester* v. *Georgia*, 6 Peters 515. Under the General Allotment Act and other specific acts, tribal lands were divided in severalty among the members of the various tribes with a view toward assimilating the Indians. But Indian allottees did not become the owners outright. By the device of a trust patent or a restricted fee, the allottees were denied power to alienate or encumber their lands for fixed periods of time, which have from time to time been extended. Conveyances by Indian allottees in defiance of the restrictions were held invalid and the United States, capable of maintaining suits to set such conveyances aside. *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Heckman* v. *United States*, 224 U. S. 413; *United States* v. *Candelaria*, 271 U. S. 432.

Under the allotment acts, Indian lands have been uniformly regarded as having two important characteristics deriving from the relationship of the United States to the Indians. First, the allotted lands are property which the United States is under governmental obligation to protect and preserve as the property of its Indian "wards." *Heckman* v. *United States*, 224 U. S. 413. Second, the allotted lands are the means by which the

United States provides for the welfare of the Indians and educates them, so far as possible, to assume the responsibilities of property and manage their own affairs.[5] *United States* v. *Rickert*, 188 U. S. 432; *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575.

As a result of these two characteristics it was early decided that under the Constitution allotted lands could be exempted from taxation by the State. *United States* v. *Rickert*, 188 U. S. 432. In that case the Court pointed out that State taxation would interfere with the purpose of Congress by preventing performance of a covenant in the trust patent allotting the lands to turn over the lands unencumbered at the end of 25 years, and then held (p. 437):

> They [the Indians] occupy these lands with the consent and authority of the United States, and the holding of them * * *

[5] Allotments in severalty were halted by the Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, and by the Oklahoma Welfare Act of June 26, 1936, 49 Stat. 1967. These Acts, particularly the former, reflected a major change in policy. The theory of the allotment acts was that the Indians could best be assimilated into white society through the break-up of tribal government and property, and especially through the compulsory individualization of Indian land. The theory of much recent legislation is that Indians can better meet the problems of modern life through corporate, group, or tribal action than as assimilated individuals, and that corporate property holding, collective responsibility, and tribal self-government should therefore be encouraged.

> is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship. * * * To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race * * *.

Thus the implied statutory exemption of lands allotted in severalty subject to restrictions against alienation was sustained at least in part squarely upon the ground that the lands were instruments of federal policy immunized from State taxation. Since the *Rickert* case the tax free character of restricted, allotted lands has been clear, and questions have arisen chiefly concerning the scope of the immunity as applied to non-Indians developing the land. *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522; *Howard* v. *Gypsy Oil Co.*, 247 U. S. 503; *Large Oil Co.* v. *Howard*, 248 U. S. 549; *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609; cf. *Board of Commissioners* v. *United States*, 308 U. S. 343. Compare *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, overruling *Gillespie* v. *Oklahoma*, 257 U. S. 501.

Although the Creeks were not affected by the General Allotment Act, their lands were allotted in severalty under an agreement negotiated by the Dawes Commission and incorporated into the Act of March 1, 1901 (31 Stat. 861) as amended by a

supplemental agreement incorporated into the Act of June 30, 1902 (32 Stat. 500). The members of the Tribe were enrolled and each was allotted 160 acres out of which a homestead of 40 acres was selected by each member. The homestead was declared to be "nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years * * *." The remaining lands, commonly referred to as surplus, were not to be alienated or encumbered for 5 years from June 30, 1902 (section 7 of original agreement, as amended by section 16 of the supplemental agreement). By the Act of April 26, 1906, section 19 (34 Stat. 137, 144), all of the lands of full bloods were made restricted for a period of 25 years and all restricted lands were declared to be exempt from taxation as long as the title remained in the original allottee.

By subsequent statutes the restrictions upon the allotted lands of Indians of the Five Civilized Tribes were altered from time to time in respects of no importance here, as were the exemptions conferred. See Cohen, *op. cit. supra*, pp. 439–442. Today the allotted lands, both homestead and surplus, held by Indians of the Five Civilized Tribes of three-fourths or more Indian blood and the

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Wosey John Deere was an enrolled member of the Creek Tribe (R. 6) and, unquestionably, it was pursuant to these Acts that she received the allotted lands from which accrued the royalties used to purchase the lands in suit.

homestead allotments held by Indians having one-half or more than one-half and less than three-fourths Indian blood may not be alienated until 1956, except with the approval of the Secretary of the Interior, who may remove the restrictions according to such rules and regulations as he may prescribe. Act of May 27, 1908, Section 9, 35 Stat. 312, 315. By express enactment 160 acres of allotted lands are exempt from tax. Act of May 10, 1928, Section 4, 45 Stat. 495, 496.

Two additional points concerning allotted lands should be marked. First, although the grant of tax exemption has been regarded as creating a vested right which even Congress cannot disturb (*Choate* v. *Trapp*, 224 U. S. 665; *Ward* v. *Love County*, 253 U. S. 17; *Carpenter* v. *Shaw*, 280 U. S. 363), the Court squarely decided that allotment legislation was subject to changes extending the restrictions and that, so long as the property was held by an Indian, restrictions could be reimposed even though for a time the property had been freed. *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Brader* v. *James*, 246 U. S. 88. Second, it is equally well-established that the grant of citizenship to an Indian is in no way inconsistent with the exercise of authority over his lands. *United States* v. *Celestine*, 215 U. S. 278, 291; *Hallowell* v. *United States*, 221 U. S. 317; *United States* v. *Noble*, 237 U. S. 74, 79; *United States* v. *Nice*, 241 U. S. 591.

Both points were clearly stated in *Brader* v. *James*, 246 U. S. 88, 96:

> While the tribal relation existed the national guardianship continued, and included authority to make limitations upon the rights which such Indians might exercise in respect to such lands as are here involved [Creek lands freed of restriction under an earlier statute by devolution to a full blood Creek heir]. This authority did not terminate with the expiration of the limitation upon the rights to dispose of allotted lands; the right and duty of Congress to safeguard the rights of the Indians still continued. It has been frequently held by this court that the grant of citizenship is not inconsistent with the right of Congress to continue to exercise this authority by legislation deemed adequate to that end. It is unnecessary to again review the decisions of this court which support that authority. Some of them were reviewed in the *Tiger Case*. The doctrine is reiterated in *Heckman* v. *United States*, 224 U. S. 413, and *United States* v. *Nice*, 241 U. S. 591, 598.

Proceeds of Allotted Lands.—Although a purpose of the allotment acts was to provide land for each Indian to settle upon and cultivate, in practice many allotments were worthless as farms and others far more valuable for minerals, oil, and timber. Sales and leases of the restricted property were made and the proceeds were converted into trust or restricted funds for the Indians. Such

personal property has been generally regarded as standing in lieu of the allotted lands, subject to the same or similar restrictions and favored with the same tax exemptions, because it is the means by which the federal government executes its duty and power to support, protect, and educate the Indians. *United States* v. *Thurston County*, 143 Fed. 287 (C. C. A. 8); *National Bank of Commerce* v. *Anderson*, 147 Fed. 87 (C. C. A. 9); (both seemingly approved in *Sunderland* v. *United States*, 266 U. S. 226). Whether, in the absence of an express statute, the immunity extends to other Indian funds need not be considered here.*

Restricted Lands Purchased out of Trust Funds.—We come, therefore, to the kind of Indian property involved in the instant case—property purchased for individual Indians by the federal government out of the proceeds of sales or leases of allotted lands, or out of other restricted funds. Although petitioners may describe their acquisition as the investment of royalties received by wealthy owners of oil and mineral lands—and doubtless that aspect of the matter exists—nevertheless the problem is more realistically viewed as one of procuring farms and homes for Indians whose original allotments were unsuitable. As stated in the Meriam Report to the Secretary of

* This question is discussed briefly in Cohen, *op. cit. supra*, pp. 262–263.

the Interior on *The Problem of Indian Administration* (Brookings Institute, 1928), p. 795:

> The volume of such purchases [from restricted funds] is large because the allotments originally made to Indians are often not suitable for homes. These original allotments must be sold and new property purchased if the Indians are to be started on the road to better social and economic conditions. In order to preserve these new lands for the use and benefit of the Indian owner, it has been the uniform rule to impose upon them the restrictions which existed upon the funds with which they were obtained. * * *

Although there are few early decisions, there seems never to have been any serious question of the power of the federal government to restrict the ability of an Indian to alienate or encumber lands purchased for him from his trust or restricted funds,[9] thus devoting the purchased lands to the

[9] See *United States* v. *Thurston County*, 143 Fed. 287 (C. C. A. 8); *National Bank of Commerce* v. *Anderson*, 147 Fed. 87 (C. C. A. 9). In *McCurdy* v. *United States*, 246 U. S. 263, it was held that the Secretary of the Interior could not restrict the lands bought by an Osage Indian out of trust funds released to the Indian outright six months earlier. The Court made clear, however, that the federal power over the Indians was broad enough to warrant such action if Congress authorized it, viz:

"While an Indian is still a ward of the Nation there is power in Congress even to reimpose restrictions upon property already freed. *Brader* v. *James*, 246 U. S. 88; but Congress did not confer upon the Secretary of the Interior authority to exercise such power under the circumstances of this case or to give to property purchased with released funds immunity from state taxation."

same federal uses which made it constitutional for Congress to exempt allotted lands from State taxation. In respect to Creek Indians, both the constitutional power of the federal government and the statutory authority of the Secretary of the Interior were sustained in *Sunderland* v. *United States*, 266 U. S. 226. The case was this: Section 1 of the Act of May 27, 1908, 35 Stat. 312, authorized the Secretary to remove restrictions upon the sale of Creek allotted lands "under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." Acting thereunder, the Secretary, pursuant to regulations, permitted the sale of the restricted lands of a Creek allottee, held the proceeds subject to restrictions, and later permitted them to be used to purchase land upon condition that the deed of conveyance contain a clause prohibiting alienation or encumbrance without approval of the Secretary. Nevertheless, the Indian attempted to convey the land. The Court held, first, that there was power, so long as the Indians were wards of the Government, thus to interpose "the strong shield of federal law to the end that they be not overreached or despoiled in respect of their property of whatsoever kind or nature" (p. 234); and, second, that "the authority of the Secretary to withhold his consent to the proposed investment of the proceeds subject to his control, includes the lesser authority to allow the

investment upon condition that the property into which the proceeds are converted shall be impressed with a like control" (p. 235).[10]

This power of the Secretary to invest the proceeds of allotted lands in other lands more suitable for Indian uses and to restrict its alienation is not confined to the Creeks. On the contrary, the same power has been granted in respect of lands allotted under the General Allotment Act,[11] and has been widely exercised to meet the problem of supplying the Indians with suitable farms and homes. Meriam, *loc. cit. supra.* It is fair to say, therefore, that the power of the federal government to acquire new property for Indians and to regulate it, has long been recognized and

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[10] It was pursuant to the authority conferred by Section 1 of the Act of May 27, 1908, and sustained in the *Sunderland* case that the Secretary bought the lands in question and imposed restrictions upon them. The restricted funds used were proceeds of a lease of Wosey John Deere's allotted lands and not of a sale, but it has not heretofore been supposed that this difference is material. The proceeds of leases are subject to the same measure of control by the Secretary and the reasoning of the *Sunderland* case has been regarded as controlling. See *United States* v. *Brown*, 8 F. (2d) 564 (C. C. A. 8), certiorari denied, 270 U. S. 644.

Likewise, the reason of the *Sunderland* case is the basis for the well established practice of permitting conveyances of restricted Indian lands to other Indians subject to a restriction. See p. 32, n. 18, *infra*.

[11] *United States* v. *Yakima County*, 274 Fed. 115 (E. D. Wash.); *United States* v. *Nez Perce County*, 267 Fed. 495 (D. Idaho). See also *United States* v. *Law*, 250 Fed. 218 (C. C. A. 8).

is an established part of the management of Indian affairs.

But although the power to acquire new lands and restrict them has been generally regarded as clear, the tax status of such lands was long confused. For a time the prevailing Departmental opinion was that the lands, being restricted, stood in the place of the allotted lands and were federal instrumentalities exempt from state taxation.[12] The decisions of this Court were not opposed. Compare *United States* v. *Rickert*, 188 U. S. 432, holding restricted allotted lands exempt, with *Goudy* v. *Meath*, 203 U. S. 146, holding that in the absence of an express manifestation of that intent Congress would not be held to have exercised its power to exempt unrestricted land from state taxes. See also *McCurdy* v. *United States*,

[12] Solicitor's Opinion of October 11, 1915, D–39322; Circular No. 1849, issued by the Commissioner of Indian Affairs under date of February 3, 1923; letter from the Second Assistant Commissioner of Indian Affairs to William E. Borah, United States Senate, dated February 18, 1913, approved by the Assistant Secretary of the Interior February 19, 1913; letter from the Assistant Commissioner of Indian Affairs to the Secretary of the Interior dated December 14, 1915, approved December 16, 1915, dealing with lands purchased for Indians of the Five Civilized Tribes; letter dated June 21, 1919, from the First Assistant Secretary to the Attorney General relating to the taxability of lands purchased for a Creek Indian of the Five Civilized Tribes; letter from the Commissioner of Indian Affairs to Hon. P. W. Burns, State's Attorney, Dewey County, Timber Lake, South Dakota, dated January 11, 1928, approved by the Assistant Secretary January 13, 1928.

246 U. S. 263. And two district courts had held that restricted lands acquired with the proceeds of sale of allotted lands were tax-exempt. E. g. *United States* v. *Nez Perce County*, 267 Fed. 495 (D. Idaho); *United States* v. *Yakima County*, 274 Fed. 115 (E. D. Wash.).

Two decisions of the Circuit Court of Appeals for the Eighth Circuit cast doubt upon the supposition that restricted lands purchased from the proceeds of restricted allotted lands were tax free;[13] and in 1928 *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, raised the issue squarely in this Court. The Court decided that the lands were instruments of federal policy which Congress could constitutionally exempt from tax but that the gradual legislative relaxation of restrictions and withdrawal of tax exemptions were convincing that Congress did not intend the "mere conveyancer's restriction" imposed by the Secretary to free the lands from tax. It held (pp. 580–581):

> In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instru-

[13] *United States* v. *Gray*, 284 Fed. 103; *United States* v. *Ranson*, 284 Fed. 108, affirmed, 263 U. S. 691; see *United States* v. *Brown*, 8 F. (2d) 564, certiorari denied, 270 U. S. 644.

> mentalities in that process. But they are far less intimately connected with the performance of an essential governmental function than were the restricted allotted lands, and the accomplishment of their purpose obviously does not require entire independence of state control in matters of taxation. * * * There are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks. [Citations omitted.] These lands we take to be of that character.

But although the previous course of legislation had been such as to convince the Court of the Congressional purpose to limit tax exemption of Indian lands,[14] it was subsequently revealed in the Meriam Report that there was serious need for granting a tax exemption to restricted lands purchased from restricted funds. After pointing out that such lands must often be acquired if the development of the Indian is to advance (see p. 22, *supra*), the report continued (pp. 795–796):

> In order to preserve these new lands for the use and benefit of the Indian owner, it has been the uniform rule to impose upon them the restrictions which existed upon the funds with which they were obtained.

[14] But note the subsequent shift in policy evidenced by the Wheeler-Howard Act and Oklahoma Welfare Act, p. 16, n. 5, *supra*.

> Some states are claiming and exercising the power to tax such lands. Since the Indian owner, on account of his lack of ready funds or his insufficient sense of public responsibility, either cannot or will not pay taxes, the result is that the lands purchased for his permanent home are speedily slipping from him and he himself is becoming a homeless public charge. This unfortunate situation is rendered more acute because the terms of the deeds prohibit alienation by voluntary act, and thus the Indian owner is not able either to mortgage or sell his lands to secure for himself the interest that he may have in the land over and above the delinquent taxes.

Then, after discussing the decisions prior to the *Shaw* case, the report made this express recommendation (p. 797):

> If, as has been inferred, there be doubt as to the intention of Congress to give immunity from state taxation, it is recommended that legislation be secured expressly conferring the exemption. The states will not suffer from such a practice, for in return for the lost taxes on the purchased lands will be the subjection to the state taxing power of the relinquished lands, or of the funds used in making the new purchase.

In the case of Indians of the Five Civilized Tribes this recommendation was partly adopted in 1931 in an act providing that whenever the Secretary

should thereafter sell nontaxable, restricted land, he should have power to reinvest the proceeds in other land which should likewise be nontaxable and restricted [15] and the following year the statute was amended to extend like relief to other Indians.[16] But in respect to lands already purchased the difficulty remained.

A second problem also came to light after the decision in the *Shaw* case. As we have shown, the Government had erred in its opinion and had represented to the Indians that lands which were purchased by them under the supervision of the Secretary out of their restricted funds and held by them subject to restrictions against alienation or encumbrance would be tax-free. Many Indians had failed to pay taxes in reliance on the representation and there was, in any event, a need to keep faith.

Thereafter, the Act of June 20, 1936, here involved, came before Congress. It was intended to meet with the situation which we have described. Both the Senate and House Committees, which reported the bill favorably in the form recommended by the Commissioner for Indian Affairs, included in their reports a letter from the Secretary of the Interior explaining the bill (S. Rep. 2168, H. Rep. 2398, 74th Cong., 2d Sess.). The letter referred to the mistaken belief that the lands were tax free

[15] Act of March 2, 1931, 45 Stat. 1471.
[16] Act of June 20, 1932, 47 Stat. 474.

(citing the *Yakima* and *Nez Perce County* cases, *supra*), to the representations made to the Indians, and to the fact that some had lost their lands, and concluded (p. 2)—

> This bill is intended to stop further taxation of restricted lands now held by Indians which have been purchased for them with their individually owned trust or restricted funds, and to redeem or reacquire any such lands heretofore sold for nonpayment of taxes. * * *

The bill was enacted in the form recommended. Section 1 appropriated money to redeem or repurchase lands taken for taxes; Section 2 provided—

> SEC. 2. All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress.

During the following year it was found that this section was too broad and it was amended by the Act of May 19, 1937, 50 Stat. 188, to grant the exemption to all homestead lands purchased with restricted funds of an Indian if title was held subject to restrictions (see p. 37 *infra*).

II

THE ACT OF JUNE 20, 1936, WAS APPLICABLE TO EXEMPT FROM 1937 OKLAHOMA REAL ESTATE TAXES THE LANDS PURCHASED FROM THE TRUST OR RESTRICTED FUNDS OF WOSEY JOHN DEERE

The Act of June 20, 1936 (p. 29, *supra*), declares exempt from State taxation Indian lands which meet two conditions, and only two. First, title must be held "subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary." Second, the lands must have been theretofore "purchased out of trust or restricted funds of said Indian." If those qualifications are met, then, so far as the Act can exempt them, the lands are immune from tax.

In Oklahoma the taxable status of property is fixed as of January 1 of each year although taxes are levied as of July 1, which is the beginning of the fiscal and taxable year.[17] On January 1, 1937, the lands in question were held "subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary." Wosey John Deere, who would be liable for any tax, held the life estate with the remainder in her children; valid restrictions were imposed by the Secre-

[17] *Board of Commissioners* v. *Central Baptist Church*, 136 Okla. 99; *In re Sinclair Prairie Oil Co.*, 175 Okla. 289, 293–295, 296. Since no cross-petition for certiorari was filed we do not here urge that the Act of June 20, 1936, exempted the lands from 1936 taxes assessed thereafter regardless of the taxable status of the land on January 1 of that year.

tary when the land was purchased for Wosey John Deere from her restricted funds and were imposed upon the children in the deeds by which the remainder was conveyed to them (R. 14–16, 16–18, 18–20, 21–22).[18] Also, the lands were purchased from the "trust or restricted funds" of Wosey John Deere. Thus, both qualifications are met.

In seeking to avoid the force of the original Act in respect of the 1937 taxes, petitioners make two arguments. They say first (Pet. 19–21)[19] that the Act does not apply to lands "purchased from trust or restricted funds" at all (although Congress used those very words), but applies only to lands pur-

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[18] It is settled that the Secretary has power under Sections 1 and 2 of the Act of May 27, 1908, 35 Stat. 313, to include a restraint upon alienation or encumbrance without his approval in any deed by which he acquires land for a Creek Indian from trust or restricted funds received from sale or lease of allotted, restricted lands. See pp. 23–24, *supra*. The restricted funds of Wosey John Deere came from royalties from an oil lease of her alloted, restricted lands (R. 15–16).

The Secretary also has power to restrict the lands in the hands of Indian grantees (the children, in the instant case), upon approving a conveyance of restricted Indian land. This well-established practice has often been approved. *Drummond* v. *United States*, 34 F. (2d) 755 (C. C. A. 8); *Clinkenbeard* v. *United States*, 109 F. (2d) 730 (C. C. A. 10); Opinion below, R. 66; *United States* v. *Homeratha*, 40 F. (2d) 305 (W. D. Okla.).

[19] At the time when it was necessary to send this brief to press we had not received petitioners' brief. Consequently, we refer to the petition for certiorari for the points which petitioners make concerning the interpretation and constitutionality of the statutes involved.

chased by the Secretary of Interior for "landless Indians" from funds appropriated by Congress for that purpose. Second, petitioners seem to contend (Pet. 21–23) that the original Act exempted only lands held by the Indian whose funds were used for the purchase, and that these lands were not so held on January 1, 1937, because Wosey John Deere, although she held the life estate and was liable to pay the taxes, had conveyed the remainder to her children. Neither contention can maintained.

1. *The application of the Act of June 20, 1936, is not limited to lands purchased from funds appropriated by Congress for "landless Indians."*

The contention that the Act of June 20, 1936, applies only to Indians whose lands were purchased from funds appropriated by Congress because they owned no other lands, is belied by the very words of the Act. The Act speaks of lands "purchased out of trust or restricted funds" and, as the court below pointed out in *Muskogee County* v. *United States,* decided January 6, 1943, "there is certainly nothing in the text of the original Act which indicates a congressional purpose to limit the scope of the Act to Indians not already seized of allotted lands." Senator Thomas' statenient (80 Cong. Rec. 9159) that the Act was designed to immunize only lands purchased from congressional appropriations for "landless Indians" was evidently the result of a misunderstanding, and cannot control

the interpretation of the Act contrary to its clear words. *Pennsylvania R. R. Co.* v. *International Coal Min. Co.*, 230 U. S. 184; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77; *United States ex rel. Marcus* v. *Hess*, No. 173, this Term, decided January 18, 1943.

In any event, more authoritative indicia of the congressional purpose are convincing that in this respect the words of the Act accurately express the congressional intent. As we have shown, there was a need to grant an exemption from taxation to lands purchased from the restricted funds of Indians whose allotted lands were, for one reason or another, unsuited for Indian use; and this was particularly true in the case of Indians who had been led to believe that the lands so purchased were exempt from tax. Solution of these problems by legislation had been recommended in 1928 in the Meriam report, and the House and Senate Committee reports on the bill show plainly that this was the problem at which it aimed. See pp. 29–30, *supra*. Likewise, the Department of Interior, which drafted and supported the Act, has given it this construction. Opinion of the Solicitor, 56 I. D. 48; Cohen, *op. cit. supra*, pp. 260–261. Under those circumstances its interpretation is a persuasive factor in ascertaining the Congressional intent. *Blanset* v. *Cardin*, 256 U. S. 319, 326. On the other hand, we find no history nor material before Congress that furnishes the slightest founda-

tion for Senator Thomas' statement and petitioners' elaborate argument that the Act was part of a program for acquiring lands for "landless Indians" who were not included in treaties relative to the distribution of land.

The subsequent congressional history of the 1936 Act confirms this interpretation. On February 13, 1937, Acting Attorney General (now Mr. Justice) Reed gave his opinion that Section 2 exempted from taxes lands which were purchased from the restricted funds of individual Osage Indians (who were not "landless") in addition to their homestead allotments (38 Op. A. G. 577).[20] Subsequently, in reporting a bill (H. R. 3008, 75th Cong., 1st Sess.) to repeal Section 2 of the 1936 Act, the House Committee on Indian Affairs stated, "It will be observed from the language of section 2, which is as follows * * * that *it applies to all lands purchased by restricted Indian funds*, and the Attorney General so held" (H. Rep. 562, 75th Cong., 1st Sess., pp. 1–2). [Italics added.] A Senate bill (S. 150) to limit Section 2 to homestead lands purchased from restricted funds was substituted for the repealer, and became the Act of May 19, 1937 (p. 37, *infra*,) but the Senate committee report also makes clear that the original Act covered all restricted Indian lands

[20] It was so held in *United States* v. *Board of Commissioners*, 26 F. Supp. 270.

purchased out of restricted funds (S. Rep. 332, 75th Cong., 1st Sess.).

2. *On January 1, 1937, Wosey John Deere "held title" to the lands within the meaning of the Act of June 20, 1936.*

For present purposes we may assume *arguendo* that petitioners are correct in their contention (Pet. 23) [21] that under the 1936 Act the exemption extends only to lands "title to which is held by the person whose funds were used to purchase the land. Even upon that assumption, the lands in question were exempt from taxes for 1937. They were bought with the funds of Wosey John Deere and, on January 1, 1937, she held a restricted life estate and her children a restricted remainder in fee. This holding of title to the life estate fulfills the requirements of the Act. In Oklahoma the life tenant is under a duty to pay the taxes on the land; their burden falls on him and his estate. 60 Okla. St. Anno. § 69; *Helm* v. *Belvin*, 107 Okla. 214; *Riley* v. *Collier*, 111 Okla. 130; *Waldon* v. *Baker*, 184 Okla. 492, 494. Consequently, every consideration of policy making for an exemption while the entire restricted fee is held by an Indian purchaser applies with equal force while the Indian purchaser holds the life estate. Under such circum-

[21] For reasons stated, pp. 39–40, *infra*, we believe that this contention is, in fact, erroneous and that the 1936 Act extends the exemption to *lands* in accordance with the usual Congressional policy.

stances it is impossible to suppose that Congress intended the exemption to be defeated simply by a conveyance of any one of the bundle of rights of which "title" is composed. Since the Act is concerned with a tax exemption, the test of whether an Indian purchaser has "title" must be whether he has retained such a property interest that, but for the Act, he would be subjected to the tax. Wosey John Deere retained such a "title" in the instant case.

III

THE ACT OF MAY 19, 1937, IS APPLICABLE TO THE LANDS PURCHASED FROM THE TRUST OR RESTRICTED FUNDS OF WOSEY JOHN DEERE AND HELD BY HER CHILDREN AS HOMESTEAD LANDS SUBJECT TO RESTRICTIONS AGAINST ALIENATION OR ENCUMBRANCE

The homestead lands involved in the instant case meet the description set forth in the Act of May 19, 1937. It provides:

> All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians * * * shall be nontaxable until otherwise directed by Congress: *Provided,* That the title to such homesteads shall be held subject to restrictions * * *

Respondents' lands were properly designated as homestead. They were purchased from the trust funds of an individual Indian, Wosey John Deere. And they are held subject to restrictions against alienation or encumbrance without the approval of

the Secretary. It would seem too plain for argument, therefore, that Act applies.

Nevertheless, petitioners contend that that Act should be differently construed. They say, first, that it applies only to lands purchased by "landless Indians," making the same argument as is made in respect to the 1936 Act, and, second, that after 1937 the lands were no longer exempt because they were held not by Wosey John Deere but by her grantees. Neither interpretation is sound.

1. *The application of the Act of May 19, 1937, is not limited to lands purchased from funds appropriated by Congress for "landless Indians".*

We have shown above that the Act of June 20, 1936, was intended, in accordance with its words, to grant the exemption in the case of "all lands * * * purchased out of trust or restricted funds of [an] Indian", whether or not the Indian also held other lands. That the Act of May 19, 1937, has that meaning, limited to homesteads, is doubly clear. When the 1937 Act was before Congress, the House Committee on Indian Affairs stated that the 1936 Act applied to all Indians and to all lands purchased from restricted funds, and pointed out that the Attorney General had so held (H. Rep. 562, 75th Cong., 1st Sess., pp. 1–2). Thereafter, the 1937 Act was enacted; Congress repeated the same words but substituted "homesteads" for lands. In view of this history it would be wholly improper to read into the 1937

Act any limitation to so-called "landless Indians".

'2. *The Act of May 19, 1937, grants an exemption to lands purchased from trust or restricted funds of an Indian so long as the lands are restricted even though they have passed to Indian grantees.*

The 1937 Act clearly and explicitly provides that homesteads purchased out of the trust funds of individual Indians shall be tax exempt provided they are held subject to restrictions against alienation or encumbrance without the approval of the Secretary. The Act does not say, and there is not a word to suggest, that the exemption is to terminate upon transfer of the lands to Indian heirs or grantees subject to restriction. Likewise, nothing in the situation before Congress or in the legislative history even hints that Congress had that intention but neglected to make it express. The limitation, therefore, cannot be read into the Act.

The argument to the contrary is founded upon the assumption that "the 1936 Act made the exemption a personal right" (Pet. 23) because it exempted "lands title to which is now held by an Indian * * * heretofore purchased out of trust or restricted funds of said Indian"; and from that premise it is argued that since the 1937 amendment was intended to limit the 1936 Act the exemption continued to be personal and terminates upon any transfer of the lands. We dispute the soundness of that assumption on the ground that the word "said" is not strong enough to compel

the conclusion that Congress departed from its practice of attaching exemptions and restrictions to *lands* and not to their owners (see p. 41, *infra*). But even if the 1936 Act should be so construed, there is no reason to suppose that the 1937 Act, contrary to its plain words, was intended to incorporate the same limitation. Unquestionably, the chief purpose was to limit the sweeping exemption of all lands, granted by the 1936 Act, to homestead lands but there is no inconsistency between that object and a purpose to enlarge the exemption accorded to the relatively small amount of homestead lands so that it would also apply to restricted homesteads which had passed to grantees. The fact that so extensive a change in wording was made in the Act is highly persuasive that this change in sense was intended. If the only object was to limit the application of the Act to homesteads, that purpose could have been readily accomplished simply by substituting the word "homesteads" for the word "lands."[23]

Moreover, to make the exemption run with the land so long as it remained restricted was consistent with a well defined congressional policy. Allotted lands, for the most part, were restricted for fixed periods of time and, from time to time, the

[23] The only relevant legislative material is the report of the Senate Committee on Indian Affairs (S. Rep. 332, 75th Cong., 1st Sess.). It explains that the 1936 Act was too sweeping in classes of property covered, and that the substitute was proposed by the Commissioner of Indian Affairs.

duration of the restrictions has been extended. In such cases, even apart from express statutes, the restrictions run with the land when it descends to the heirs, *Bowling* v. *United States*, 233 U. S. 528; *United States* v. *Reily*, 290 U. S. 33; and in the case of *inter vivos* transfers—assuming the lands could be transferred with approval of the Secretary—the same result has been accomplished by the Secretary's inserting a restriction in the deed to the grantee as a condition of approving the transfer (see pp. 23–24, 32, *supra*). Moreover, the exemption granted by the Acts of March 2, 1931, and June 20, 1932, to restricted lands thereafter purchased with the proceeds of allotted lands passes with the lands. In view of this general background and the precise analogy of the 1931 and 1932 Acts, it would be reasonable to suppose, even if the 1937 act were ambiguous, that when Congress granted the tax exemption to homestead lands theretofore purchased out of restricted funds, it made that exemption also run with the restriction and with the land. The instant case is stronger for that is the clear effect of the statutory words.

IV

THE ACTS OF JUNE 20, 1936, AND OF MAY 19, 1937, ARE CONSTITUTIONAL.

As pointed out in our discussion of the historical background of the statutes involved, the Federal Government has always exercised the undisputed

power to protect the Indians from their white neighbors, official and unofficial, and to protect both tribal and individual property. This power was the basis of the dealings of the United States with the Creek Tribe. When the vast domain of the Creeks east of the Mississippi was surrendered to the United States, the Federal Government undertook to protect the new Creek lands west of the Mississippi against interference by any future State. Treaty of March 24, 1832, Article XIV, 7 Stat. 366, 368. Again, when at the start of the present century the Creek tribe was induced to surrender the greater part of its tribal lands and to permit the allotment of its lands in severalty (see p. 18, *supra*), an essential part of the agreement was the specific promise of the Federal Government to protect the individual lands from taxation. Act of March 1, 1901, 31 Stat. 861, as supplemented by Act of June 30, 1902, 32 Stat. 500. The exercise from earliest years down to the present day of this power to protect Indian lands against all forms of alienation, encumbrance or interference is the strongest possible evidence of the existence and vitality of the power. Cf. *Kansas Indians, supra.*, Where Congress deems it necessary to forbid State taxation in order to protect such lands, it has the power to enact the appropriate legislation and the wisdom of that policy is not open to question by litigation. The uniform decisions of this Court upholding without exception

every Act of Congress protecting Indian property leave no basis for petitioners' attack upon the constitutionality of the stututes here in question.

Alternatively, the statutes involved are clearly constitutional on the ground that the purchased lands are means by which the federal government carries out its Indian policy and which Congress may therefore exempt from the interfering effects of taxation by the States. There can be no doubt of the power of Congress to exempt from State taxation the lands allotted to individual Indians from tribal reservations and held by them subject to restrictions against alienation or encumbrance. The source of that authority has been outlined above. (See pp. 15–21, *supra.*) The United States has the governmental duty and power not only to preserve and manage Indian property, but also to support and educate the Indians themselves. The allotment of tribal lands in severalty and the retention of a measure of control by restricting alienation or encumbrance is an exercise of those admitted powers. The lands are in a true sense the instruments of authorized federal activity, no less so than if the United States owned the lands and gave their use to the Indians. On these grounds, the lands may be rendered immune from interference by State taxation. *United States* v. *Rickert*, 188 U. S. 432; *Choate* v. *Trapp*, 224 U. S. 665; *Gleason* v. *Wood*, 224 U. S. 679; *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292; *Indian Ter-*

ritory Illuminating Oil Co. v. *Oklahoma*, 240 U. S. 522; *Howard* v. *Gypsy Oil Co.*, 247 U. S. 503; *Large Oil Co.* v. *Howard*, 248 U. S. 549; *Ward* v. *Love County*, 253 U. S. 17; *Oklahoma* v. *Barnsdall Corp.*, 296 U. S. 521; *Board of Commissioners* v. *United States*, 308 U. S. 343; cf. *Goudy* v. *Meath*, 203 U. S. 146; *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575.

This established power to exempt restricted allotted lands from State taxation does not rest upon any peculiar characteristics resulting from their former ownership by Indian Tribes which were regarded as being beyond the jurisdiction of the States (see pp. 9, 15, *supra*). It is simply an illustration of the power of the federal government, when it is engaged in lawful activities "to protect the operations thus validly authorized" against interference or hindrance through taxation by the States. *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, 33. The most familiar illustrations of the exercise of this protective power are the immunities conferred upon government financial corporations,[24] but the power itself is not so confined, and there are several closer analogies to the power to exempt Indian lands, dominion over which is divided between the United States and the Indians.

[24] E. g., *McCulloch* v. *Maryland*, 4 Wheat. 316; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21; *Federal Land Bank* v. *Bismark Co.*, 314 U. S. 95.

For example, property owned and employed by the federal government may, of course, be exempted from State taxation even though it has been taken only in collection of taxes and for resale to a private owner. *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *Lee* v. *Osceola Imp. District*, 268 U. S. 643. Likewise, the federal government may provide that bonus payments made to assist former soldiers shall be exempt from State taxation even after complete ownership of the money has been transferred to the veteran. *Trotter* v. *Tennessee*, 290 U. S. 354, 356; *Lawrence* v. *Shaw*, 300 U. S. 245. See also *Bank* v. *Supervisors*, 7 Wall. 26; *Railroad Company* v. *Peniston*, 18 Wall. 5. The decision in *Helvering* v. *Mountain Producers Corp*, 303 U. S. 376 U. S. 575, both questions were answered affirma- upon the general protective power of Congress or upon the specific authority to grant a tax-exemption to restricted Indian lands allotted from tribal reservations.

The only possible questions in the instant case, therefore, are, first, whether the federal power reaches to lands acquired from private persons for Indian ownership with restricted Indian funds and, second, whether it is reasonably appropriate to the exercise of that power to exempt the lands from tax. In *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 567, both questions were answered affirmatively, although it was held that such lands were subject to tax in the absence of an express statutory

immunity.[25] Earlier, in *Goudy* v. *Meath*, 203 U. S. 146, it was assumed that Congress had power to immunize even unrestricted Indian property from state taxation. We submit that the affirmative answers are correct and that the rationale of the *Shaw* case should be followed.

As we have pointed out (pp. 15–16, *supra*) the control of the federal government over the original tribal property necessarily comprehended the power to develop or convert it into other assets. Likewise, the governmental duty and power to protect, support and educate the Indians often required that allotted lands unsuited for that purpose be leased or sold and that the proceeds be used to purchase other lands on which the Indians may be settled and given appropriate responsibilities subject to proper control. Such purchases have been a recognized part of the general function of superintending Indian affairs.

In *Sunderland* v. *United States*, 266 U. S. 226, it was held that the federal power reached so far in the absence of opposition from a State. The present opposition of Oklahoma, if such there is, cannot lessen the national authority, which in its sphere is dominant and supreme. Moreover, when Oklahoma became a State, it was stipulated by the

[25] The power of Congress to immunize from taxation properties and other federal instrumentalities which have no implied immunity is, of course, well established. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 161; *Helvering* v. *Gerhardt*, 304 U. S. 405, 411–412; *Federal Land Bank* v. *Bismark Co.*, 314 U. S. 95.

Enabling Act that the federal power with respect to the Indians should not be affected by her admission as a State. Oklahoma Enabling Act of June 16, 1906, Section 1, 34 Stat. 267; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Choate* v. *Trapp*, 224 U. S. 665; *Ex parte Webb*, 225 U. S. 663. Indeed, petitioners do not deny that the United States has power to purchase privately owned lands for individual Indians out of the proceeds of sales or leases of allotted lands, and to restrict them against alienation or encumbrance without its approval.

2. It was a reasonable and appropriate exercise of its power to protect federal activities from interference for Congress to exempt from tax restricted Indian lands acquired out of the proceeds of restricted, allotted lands.[20] The lands acquired with restricted funds and held by individual Indians subject to restrictions against alienation or encumbrance are the media of federal activity precisely to the same extent as tribal lands allotted in severalty; both are the means by which the Government preserves and manages the Indian's property, and by which it supports and develops the Indians themselves. When the statute involved was enacted, it will be recalled, experience had demonstrated not

[20] We assume *arguendo* that the question whether Congress could properly find that the grant of immunity was necessary is a proper subject for judicial inquiry. Cf. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421.

only that individual Indians either could not or would not learn to pay taxes on their restricted lands, but also that the restriction on alienation or encumbrance deemed necessary for the Indians' protection made it difficult to raise money to meet taxes on the land; moreover, many of the lands had been acquired on the assumption that they would be tax-free. (See pp. 22–31, *supra*). These circumstances alone are plainly sufficient to evoke the power of Congress to protect the instruments of its policy and prevent interference with its Indian program. And the consistency with which successive Congresses have granted immunity from taxation to lands restricted against alienation is itself proof that the exemption is a necessary and proper incident of the using restricted lands for the benefit of the Indians.

It is true that at the present time federal control over many lands acquired with restricted funds is exercised only by inserting "a conveyancer's restriction" against alienation or encumbrance in the deed by which title was taken. But, as we have shown (see pp. 22–25, *supra*), the property nonetheless is Indian property and at all times subject to federal control, which is complete except as limited by the guarantees of due process of law. *Brader* v. *James*, 246 U. S. 88; *Choate* v. *Trapp*, 224 U. S. 665; cf. *United States* v. *Creek Nation*, 295 U. S. 103, 109–110. Moreover, the tenure of the Indian under such a deed does not

differ in any respect now significant from his holding under a trust patent issued under the General Allotment Act, or under an allotment made under a statute expressly restricting his powers of alienation. In all these cases, the Indian is limited only in his power to dispose of the property and, with that exception, he may manage it as would its absolute owner, turning it to the same uses as any private property in the State.

The retention of so slight a measure of control does not deprive the property of its character as a means of carrying on federal activities. It is by giving the Indian the widest possible dominion over the property and by allowing him to put it to appropriate uses that he is educated to assume ordinary responsibilities; and, at the same time, through the restriction against alienation or encumbrance the property is protected against his own improvidence or any overreaching by others. In short, the divided ownership is the very characteristic which renders the property a federal instrument; the situation is precisely the same as if the United States bought and owned the land and gave its use to the Indian in order to support and educate him.

The exemption here involved, moreover, is narrowly limited. There has been no attempt to immunize individual Indians from State taxation and in that way to fulfill the Governmental obligation to maintain them. Only the lands are immunized

from State taxation, only the means by which the federal Government acts; and the taxes sought to be imposed were ordinary real estate taxes on the lands.[27]

Nor is there any showing that an excessive amount of land is made exempt. Under the Act of June 20, 1936, which applied to all restricted lands theretofore purchased with trust or restricted funds, the exemption apparently was broader than necessary and might embarrass the States by withdrawing an excessive amount of property from the reach of their taxing power, but even in that instance the reasons for protecting all Indian property clearly were sufficient to make the ultimate issue one of policy and not of power. Moreover, the Act of May 10, 1937, promptly limited the exemption to 160 acres (or in the cities, to land of a certain value), designated as a homestead, a minimum acreage which Congress evidently believed should be guaranteed to each Indian and which it concluded should therefore be withdrawn from taxation by the State.

In view, therefore, of the consistent course of Indian policy and experience, both Acts are clearly an appropriate exercise of the federal power to protect its activities and the instrumentalities thereof from the interfering consequences of State taxation. Cf. *United States* v. *Wright*, 53 F. (2d) 388 (C. C. A. 4), certiorari denied, 285 U. S. 539.

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[27] Compare *Oklahoma Tax Commission* v. *United States*, Nos. 623-625, this Term, certiorari granted, February 15, 1943, involving Oklahoma inheritance taxes.

Petitioners seek to distinguish the instant case from those involving allotted lands on the ground that these lands had been subject to State taxation and are now sought to be withdrawn. The difference is irrelevant. Whenever the national government acquires additional property from private ownership, something is withdrawn from State taxation. The increasing volume of such withdrawals as federal activity expands may invite legislative consideration of the entire problem;[28] but the constitutional power to forbid State taxation is plain (see pp. 44–45, *supra*). In respect to Indian lands the situation is the same. The United States has the power to acquire lands for Indian purposes and to withdraw them from State taxation. *United States* v. *McGowan*, 302 U. S. 535, 537; *Minnesota* v. *United States*, 125 F. (2d) 636 (C. C. A. 8). The large acreage owned by Indians in Oklahoma subject to restrictions may raise questions concerning how far such land may be granted exemption from State taxation without unduly hampering the collection of revenues necessary to the State.[29] Nevertheless, the power to

[28] See Executive Order 8034, 4 Fed. Reg. 249.

[29] It is certainly arguable that the exemption of lands purchased with the trust or restricted funds of individual Indians does not result in a net reduction of the mass of property subject to state taxation. "The states will not suffer from such a practice, for in return for the lost taxes on the purchased lands will be the subjection to the state taxing power of the relinquished lands, or of the funds used in making the new purchase."—Meriam, *The Problem of Indian Administration* (1928), p. 797.

confer the exemption exists and the decision whether to exercise it is one for Congress to make. In the instant case, as we have shown, Congress carefully struck a fair balance between opposing considerations.

It is immaterial that the respondents are citizens. It has been held too many times to admit of dispute that the grant of citizenship to the Indians is not inconsistent with their status as "wards" whose property is subject to the plenary control of the federal government, *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Heckman* v. *United States*, 224 U. S. 413; *United States* v. *Nice*, 241 U. S. 591, 598; *Brader* v. *James*, 246 U. S. 88, 96.

Likewise, it is settled that respondents, though not enrolled, are tribal Indians. As a result of the negotiations between the Five Civilized Tribes and the Dawes Commission, the members of the Tribes then living were enrolled for the purpose of determining disputes concerning ownership of tribal property and the right to allotments. Children having half blood or more are recognized by Congress as tribal Indians subject to federal control (e. g., Act of January 27, 1933, 47 Stat. 777) and they remain in that status until discharged by Congress. *Elk* v. *Wilkins*, 112 U. S. 94; *United States* v. *Ramsay*, 271 U. S. 467; *United States* v. *McGowan*, 302 U. S. 535.

Although the legislation enacted in 1901 and 1902 looked to the dissolution of the Creek Tribe and fixed the date of March 4, 1906, for the effectuating of such dissolution, the provision was later revoked by the joint resolution of March 2, 1906, 35 Stat. 822, and the Act of April 26, 1906, Sec. 28, 34 Stat. 137, 148. The Creek Tribe still exists in law and in fact and it has recently been authorized to resume many of its former powers. (Act of June 26, 1936, 49 Stat. 1967). There is thus no ground for regarding the tribal Indians concerned in this litigation as different from other tribal Indians in respect to the power of Congress to act for their protection.

CONCLUSION

The decision of the circuit court of appeals should be affirmed.

Respectfully submitted.

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MARCH, 1943

APPENDIX

The Act of June 20, 1936, 49 Stat. 1542:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby authorized to be appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of $25,000, to be expended under such rules and regulations as the Secretary of the Interior may prescribe, for payment of taxes, including penalties and interest, assessed against individually owned Indian land the title to which is held subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of an Indian, where the Secretary finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase it would be nontaxable, and for redemption or reacquisition of any such land heretofore or hereafter sold for nonpayment of taxes.

SEC. 2. All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress.

The Act of May 19, 1937, 50 Stat. 188, amended Section 2 of the Act of June 20, 1936, to read:

SEC. 2. All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress: *Provided,* That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior: *And provided further,* That the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town, or city property, not exceeding in cost $5,000, to be designated as a homestead.

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In the Supreme Court of the United States

October Term 1942.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, State of Oklahoma, a Municipal Corporation, et al.,

Petitioners.

vs

EVELYN SEBER, et al.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

BRIEF FOR OSAGE COUNTY, OKLAHOMA, AMICUS CURIAE THE INTEREST OF OSAGE COUNTY, OKLAHOMA.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

BRIEF FOR OSAGE COUNTY, OKLAHOMA, AMICUS CURIAE THE INTEREST OF OSAGE COUNTY, OKLAHOMA.

After the opinion of Mr. Stanley Reed, Acting Attorney General, to the Secretary of the Interior, dated February 13, 1937, which was copied in the appendix of the brief of the respondent in this case, the United States brought in the Northern District of Oklahoma thirteen suits against Osage County, Oklahoma, to recover taxes

paid, or to enjoin their collection. These thirteen suits presented 328 causes of action on behalf of 328 Indians, and each cause of action involved at least one and frequently several tracts of land, or parcels of real estate. The tracts of land were usually of 160 acres or more. All of those suits are still pending, but recently some of the causes of action have been dismissed by the trial court for the reason that the stipulation as to the facts disclosed that no relief could be granted.

THE OSAGE INDIANS.

It is not correct to speak of the Osage Indians as a weak defenseless people requiring the protection of the government.

When they were allotted 655 acres each in 1906 the minerals were reserved for the use of the entire tribe. In the early 1920's accruals from oil royalties exceeded $20,000.00 per annum per headright. The Osages became known as the wealthiest race of people on earth. In 1925 Congress provided for the investment of their excess or surplus funds, and it is the properties in which those investments were made, which are the subject of the litigation, now pending in the United States District Court. The Indians did not think those investments would be tax-free and neither did the Department. The Indians were not assigned to live upon the lands purchased. The $25,000.00 appropriated by Congress by the 1936 Act to pay taxes would not have paid the taxes on the real

estate involved in the litigation in the United States District Court for even one year. Some of those properties are town properties, even business properties.

The Osage Indian has his allotted homestead of 160 acres, which was merely his first selection, and few of them reside upon this allotted homestead or first selection. He has his homestead under the state law (160 acres, if in the country, and house and lot, if in town) on which he lives which, while not entirely exempt, is greatly favored as to taxes. Surely Congress did not intend to exempt a third 160 acres from taxation under the 1937 Act by merely permitting the Indian to declare that another 160 acres of land in which he had invested restricted funds was his homestead. In fact the 1937 Act presented an intention of Congress to limit the tax exemption to 160 acres. Such was the positive and clear expression of the intention of Congress in the Osage Acts herein to be noticed.

STATEMENT.

The proceedings before this Court in this case were more rapid than was anticipated, which accounts for the delay in the filing of this brief.

It seems essential to a fair interpretation of the acts to be interpreted by this Court that the other acts upon the same subject be considered and it is the hope that no decision will be rendered in this case which might be construed as applicable to the Osage Indians until the Osage Acts have been considered.

The present suits in which Osage County, Oklahoma, is involved concern the 1936 Act and the 1937 Act will be mentioned herein only in support of the contentions made concerning the 1936 Act.

The constitutionality of the 1936 Act has been questioned, but it will be assumed that that question has been thoroughly briefed and presented to this Court and the points presented herein will deal mainly with an interpretation of the Act, assuming that it is constitutional.

ARGUMENT AND AUTHORITIES.

These propositions are presented:

1. The Act of Congress of June 20, 1936, is in parimateria with other Acts of Congress concerning taxation of real estate owned by Osage Indians and must be construed with those Osage Acts, and when so construed the intention of Congress to allow each Osage Indian a tax exemption of not more than 160 acres of land is clearly shown.

2. A Special Act on the same subject controls a general act, or the Special Act must be construed as the exception to the general act even though the special act was first enacted.

3. In determining the purpose and meaning of the Act of June 20, 1936, the court should take into consideration the amendment of that Act by the Act of May 19, 1937.

4. The Act of June 20, 1936, taken alone and by itself shows that there was no intention that it should apply to property purchased for Osage Indians from their restricted funds.

5. It was not the intention of Congress that the Act of June 20, 1936, should apply to the Osage Indians on their property and it is the intention of Congress which must govern.

6. If the purpose and intention of the Act of June 20, 1936, had been to make all the real estate purchased by or for the Osage Indians out of their restricted funds exempt from taxation the Act would not apply to the taxes for the year 1936.

7. It is an invasion of State rights and in violation of the Constitution of the United States to attempt to exempt from taxation large quantities of real estate, which had theretofore been taxable.

PROPOSITION NO. I.

The Act of Congress of June 20, 1936, is in pari materia with other acts of Congress concerning taxation of real estate owned by Osage Indians and must be construed with those Osage Acts, and when so construed the intention of Congress to allow each Osage Indian a tax exemption of not more than 160 acres is clearly shown.

Extracts from the various Osage Acts are set out in Appendix A to this brief, the emphasis therein being ours.

It is very apparent from these special acts of Congress relative to the Osage Indians that Congress has specifically provided that certain property of the Osage Indians shall be taxable and that each Indian who has not received a certificate of competency shall be entitled to a tax exemption of 160 acres and no more.

The Osage Acts above referred to deal with taxation of real estate owned by Osage Indians.

The Act of June 20, 1936, was intended to apply generally to those landless Indians for whom the government had purchased lands and placed the Indians thereon and gave them to understand that the land would be theirs free from taxation. The Osage Acts apply specifically to the Osage Indians.

"All acts in pari-materia are to be taken together as if they were one law."

Ryan v. *Carter*, 93 U. S. 78, 23 L. ed. 807;
Wells v. *Pontotoc County*, 102 U. S. 625, 26 L. ed. 122;
United States v. *Central P. R. Co.*, 118 U. S. 235, 6 S. St. Rep. 1038, 30 L. ed. 173.

"All laws on the same subject are to be taken together."

Ryan v. *Carter*, 93 U. S. 78, 23 L. ed. 807;
Ex parte Karstendick, 93 U. S. 393, 23 L. ed. 889;
Greenleaf v. *Goodrich*, 101 U. S. 278, 25 L. ed. 845;
Galveston H. & S. A. R. Co. v. *Texas*, 170 U. S. 226, 18 S. St. Rep. 603, 42 L. ed. 1017.

"The construction of a particular act must be made in connection with previous legislation on the subject."

Corralitos v. *United States*, 178 U. S. 280, 20 S. Ct. Rep. 941, 44 L. ed. 1069.

"Two laws relating to the same subject are to be construed together and where the later one contains no clause expressly repealing any of the provisions of the earlier one, both are to be considered as in full force so far as there is no repugnancy between them."

The Star, 3 Wheat. 78, 4 L. ed. 338.

"Three statutes in pari-materia must be read together and no part of the previously existing law upon the same subject is to be regarded as inoperative unless no other construction of the later legislation is reasonable."

United States v. *Munday*, 222 U. S. 175, 32 S. Ct. Rep. 53, 56 L. ed. 149.

"All former statutes on the same subject, whether repealed or unrepealed, may be considered in construing provisions that remain in force."

Viterbo v. *Friedlander*, 120 U. S. 707, 7 S. Ct. Rep. 962, 30 L. ed. 776.

"As a general rule, where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown."

United States v. *Jefferson Elec. Mfg. Co.*, 291 U. S. 386, 54 S. Ct. Rep. 443, 78 L. ed. 859;
United States v. *Arizona*, 295 U. S. 174, 55 S. Ct. Rep. 666, 79 L. ed. 1371.

The brief of the respondents has set forth in the appendix the full opinion of the Solicitor for the Interior Department, Mr. Stanley Reed, rendered on March 13, 1937, concerning the Act of June 20, 1936.

In the opinion of the attorney general it is recognized that the Act of June 20, 1936, is in pari-materia with the earlier acts of Congress concerning the Osages for he states: "It is necessary to examine certain prior legislation having to do with the taxability of lands belonging to the mem-

bers of the Osage Tribe." He then quotes that part of section 1 of the Act of March 2, 1929, which has been quoted in the appendix, and which provides, "that the tax exempt land of any such Indian allottee, heir, or devisee, shall not at any time exceed 160 acres."

He then reasons as follows:

> "It is obvious that the land exempted from taxation by the main clause of this enactment is limited to homestead allotments. Considering the language of the provision as a whole it seems clear that the purpose of the main clause is to exempt from taxation homestead allotments generally, and that the purpose of the proviso is merely to limit the amount of such homestead land that the individual Indian may hold exempt from taxation. The restriction of the proviso is made to apply only to allottees, etc., mentioned in the main provision, and there would seem to be no reason why the land referred to in the proviso should not likewise be limited to homestead allotments.
>
> "Since, therefore, the 1929 statute is concerned with homestead allotments and that of 1936 with lands purchased with restricted or trust funds and restricted as to alienation or encumbrance, the earlier statute is not affected by the latter, and they may operate in entire harmony."

To us it seems apparent that the reasoning of the attorney general in the foregoing two paragraphs is very faulty. The conclusion reached is that Congress intended to exempt homesteads from taxation up to the amount of 160 acres and that, therefore, if the homestead exceeded 160 acres that part of the homestead which exceeded 160 acres was not to be exempted from taxes, but if the Indian

owned other land which was not a homestead it might be exempted from taxation.

The conclusion is contrary to the history of all Indian legislation and is particularly contrary to the policy of Congress with reference to the Osage Indians.

In the first place the language is clear. It plainly says that "*tax exempt land shall not at any time*" exceed 160 acres.

The plain purpose of this provision was overlooked by the Attorney General. The homestead allotment of each original Osage allottee was by the Allotment Act exempted from taxation for a period of 25 years or during the lifetime of the allottee.

The Osage Act of March 2, 1929, extended the trust period, and extended restrictions against alienation for another period of over 25 years or until January 1, 1959. It also extended the tax exemption of the homestead allotments for another period of more than 25 years but instead of providing for the homestead allotment to become taxable upon the death of the allottee the provision was that the homestead allotment should remain exempt from taxation as long as the original allottee of one-half or more Indian blood or his heirs or devisees held the title to that allotment.

Now the heirs and devisees of some of the allottees were bound to be persons who were themselves allottees and who already had 160 acres of tax exempt land, and therefore the plain purpose of Congress was by this pro-

vision to specifically declare that no one Indian could have more than 160 acres of tax exempt land.

The surplus allotments had become taxable within three years after the time of allotment under the provisions of the Allotment Act; so that the only tax exempt land which the Osages had or could have under the legislation which existed at the time of the passage of the Act of March 2, 1929, was the first selection, or the homestead allotment. Therefore there could have been no intention on the part of Congress that an Osage Indian could have a homestead in excess of 160 acres but could have only 160 acres of such homestead exempted from taxation. On the other hand Congress could not have intended that he might have exempted from taxation other real estate, provided it was not a part of the homestead, while he could not have that part of his homestead exempted which exceeded the 160 acres.

The purpose of the provision then was to extend the exemption from taxation of the homestead allotment for another period of 25 years or more; provided it was still held by the original allottee or his heirs or devisees. In other words, the exemption was extended to the heirs and devisees but it was recognized that the heirs and devisees might already have tax exempt lands and Congress was careful to provide that no Indian should have more than 160 acres of tax exempt land.

A homestead is by the Oklahoma law a tract of land not to exceed 160 acres. The homestead allotment of

Osage Indians was a tract of land of 160 acres. By no provision of Congress could the allotted homestead be increased to more than 160 acres, and by no provision of the Oklahoma law could a homestead be more than 160 acres. It seems to us, therefore, that there is no logic at all which supports the statement that Congress intended by this provision of the Act of March 2, 1929, to say that the Osage Indian might have more than 160 acres of land exempt from taxation provided it was not a homestead but that he could have only 160 acres exempt from taxation, if it were a homestead.

The homestead, whether a homestead under the state law or a homestead under the Osage Acts, which was only the first selection, has always received favorable legislation whether that legislation were enacted by the National Congress or by the State Legislature, and, if the Congress were intending to provide, or permit additional land tax exemptions to the 160 acres homestead, it certainly would have permitted exemption of the additional homestead, that is additional to the 160 acres had there been any such additional homestead, but Congress knew, or at least those in charge of the Osage legislation knew, that the Osage homestead, and the homestead under the Oklahoma law, was limited to 160 acres and that there could be no additional homestead so that when providing "tax exempt land of any such Indian allottee, heir or devisee shall not at any time exceed 160 acres", there could have been and was no intention that that provision should apply only to the homesteads and only in cases where the homestead

exceeded 160 acres. The provision undoubtedly means just what it says:—That no Osage Indian shall at any time have more than 160 acres of tax exempt land.

A homestead, as it is generally considered, is the home of the homesteader; the place on which he lives. The Attorney General by his opinion concedes that the Act of June 20, 1936, could not apply to the homesteads of the Osages. We do not know what kind of homestead he had in mind but, if he had in mind the place of abode, then his interpretation of the land to which the Act of June 20, 1936, was to apply is entirely different from that of Senator Thomas.

As will be shown by later quotations herein contained, Senator Thomas stated that the purpose of the bill was to relieve from taxation lands which the Government had purchased for "landless Indians". Senator Thomas also stated that the Government had "assigned Indians to reside upon said land".

Then when Section 2 of the Act of June 20, 1936, was amended by the Act of May 19, 1937, the purpose of Congress in passing the Act of June 20, 1936, was further shown by providing that only the homestead of not to exceed 160 acres of land should be exempt from taxation. It is, therefore, very plain that Congress at all times intended that the Osages should have 160 acres and no more land of any kind or nature exempt from taxation.

The whole of the legislation shows positively the intention and purpose of Congress to that effect.

It should be noted that very soon after the Attorney General's opinion there was introduced into Congress a bill to repeal section 2 of the Act of June 20, 1936, with the result that it was amended on May 19, 1937, to show what had been the intention of Congress all along that the exemption should not exceed 160 acres.

It should, also, be noted that the Commissioner of Indian Affairs recommended the amendment to section 2 which was adopted which shows also the intention of the Bureau of Indian Affairs to the effect that the tax exemption was intended to be limited to only 160 acres.

The Attorney General in his opinion next discusses the Osage Act of February 27, 1925, (43 Stat. 1008) and calls attention to the fact that section 1 of that Act authorizes the Inferior Department to invest the funds of Osages in real estate. He then calls attention to section 3 of the Act which provides that the real estate so purchased shall not be subject to "A lien of any debt, claim, or judgment, except taxes".

The Attorney General then concludes that it was the intention of Congress that the real estate so purchased should be subject to taxation but he follows that conclusion by another to the effect that when Congress passed the Act of June 20, 1936, they changed their intention and decided that the real estate so purchased should be exempt from taxation.

There can be no question but that the Act of February 27, 1925, specifically declared the intention of Con-

gress to the effect that such real estate purchased from restricted funds should be taxable and that it was taxable and taxes were paid on such real estate so purchased.

The Congress again affirmed that intention when the 1929 Act was passed, in which it was specifically provided that no Osage Indian should have exempt from taxation more than 160 acres of land, and when the Act of June 20, 1936, was under consideration by Congress the Chairman of the Committee expressed the purpose and intention to exempt only land purchased for "landless Indians", and in cases where the Department had assigned the Indians to live upon the land.

The Congress again declared what its intention was when it passed the Act of June 20, 1936, by passing the amendment of May 19, 1937, in which it was specifically declared that the exemption should not exceed 160 acres.

The Attorney General did not discuss the earlier Osage Acts but they have been discussed by the Supreme Court of the United States in the case of *McCurdy* v. *United States*, 246 U. S. 264, 38 S. Ct. Rep. 289, 62 L. ed. 706, in a case which involved the taxability of land purchased for an Osage from his restricted funds, the conveyance containing a restriction against alienation without the approval of the Secretary of the Interior. In that case the Supreme Court stated:

> "And there are in both the Act of 1906 and in that of 1912, provisions which show that Congress intended to restrict the tax exemption. By section 2 of the Act of 1906 the surplus lands became taxable af-

ter three years, even if they remained inalienable. By section 7 of the Act of 1912 both the lands and funds of allottees or their heirs are protected against claims arising prior to competency, inheritance, or removal of restrictions: but it is expressly provided 'that nothing herein shall be construed so as to exempt any such property from liability for taxes'."

Earlier in that same opinion the Supreme Court interprets the intention of Congress generally to gradually emancipate the Osage Tribe of Indians.

The same or similar interpretation of the policy of Congress toward the Indians is discussed in the case of *Shaw* v. *Gibson-Zahniser Oil Corporation*, 276 U. S. 575, 48 S. Ct. Rep. 333, 72 L. ed. 709, opinion by Mr. Justice Stone, wherein this language is used:

> "In this, as in other Indian legislation, opportunity is afforded for their emancipation by imposing upon them duties as well as giving them the privileges of citizens and property owners, including the duty to pay taxes."

It is well-established law that an Act of Congress must be construed in connection with the other Osage Acts when it is being undertaken to apply it to the Osage Indians and it then seems very clear that there was no intention of Congress to exempt the property in question from taxation and that the Acts when construed together did not exempt it from taxation.

The foregoing argument is not answered by a contention that section 2 of the Act of June 20, 1936, is not ambiguous and, therefore, requires no interpretation for the reason that the whole act must be construed together.

and when so construed it is ambiguous; and for the further reason that acts in pari-materia must be construed together whether or not the last act is ambiguous.

The Act is entitled thus:—"An Act to relieve restricted Indians whose lands have been taxed or have been lost by failure to pay taxes, and for other purposes."

The past participle "have been" is used. "Have been taxed", or "have been lost". The relief is for what has already been done, and the relief was in the form of a $25,000.00 appropriation to pay taxes. This could not apply to the Osages for the taxes against property of the Osages purchased with restricted funds for just one year exceed that sum.

By the further terms of the act itself the Osages are excluded from its operation. The act is to apply to land "heretofore purchased out of trust or restricted funds of the Indian, *where the Secretary finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase it would be non-taxable*".

There could have been no "understanding or belief" by the Osages that the land purchased for them out of their restricted funds would be non-taxable, for the very act which authorized the investment of the restricted funds of the Osages provided for the payment of taxes and the land so purchased for them had been taxed and taxes had been paid on it for years prior to 1936.

Now the obvious purpose of legislation is to remedy some evil, to correct some existing situation. Here Con-

gress pointed out the evil to be remedied and showed its purpose to correct it. The government was buying land for landless Indians and creating homes for them on that land. Those Indians had been given to understand that their homes would be tax free but for some cause the government failed to make them tax free. Hence the remedy:

First, pay the accrued taxes, and, second make those same lands tax free so that it would not be necessary to continue to pay taxes on them.

Acts in pari-materia must be construed together whether or not the last act is ambiguous. This is especially true where there is no expressed intention in the later act to repeal or modify the earlier one.

As was said by Mr. Justice Story in the case of *The Star*, 3 Wheaton 78, 4 L. ed. 338:

> "In the first place, the section in question contains no repealing clause of any of the provisions of the salvage act of 1800, and therefore the whole laws on this subject are to be construed together, and unless so far as there is any repugnancy between them, are to be considered as in full force."

We quote from the case of *Posadas* v. *National City Bank*, 296 U. S. 497, 80 L. ed. 351:

> "3. syl. Repeals by implication are not favored; and where there are two acts upon the same subject, effect should be given to both if possible.
>
> "5. syl. The mere fact that a later statute covers the whole subject of an earlier one and embraces new provisions does not demonstrate an intention to substitute the later act for the earlier, so as to effect an implied repeal.

"6. syl. The implication which will effect the repeal of a statute must be a necessary one."

In *United States* v. *Jefferson Electric Manufacturing Co.*, 291 U. S. 386, 54 S. Ct. 443, 78 L. ed. 859, this is said:

> (From opinion p. 869.) "As a general rule where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown."

In the discussion of these Acts in the local United State District Court in the Osage cases we were reminded by our adversaries that Mr. Stanley Reed had been elevated to the Supreme Court of the United States. We replied that we, of course, had respect for Mr. Reed and for his opinions but that we did not believe his appointment to the highest court of the nation made his opinion rendered as solicitor for the Interior Department infallible. As such solicitor he would have doubtless felt it to be his duty to resolve all doubts in favor of the department. As a judicial officer he would give the question more weighty and deliberate consideration to be sure that his decision was right for his opinion then would be declaring the law, while as solicitor he was merely outlining a line of action to be followed by the departmental officials, until the act received judicial interpretation.

We note that the opinion does not cite a single judicial opinion. It shows unfamiliarity with the Osage Acts. It stated, for instance, that section 1 of the Act of June 20, 1936, is "applicable to the members of the Osage Tribe". We think it must be conceded that section 1 of the Act cannot be applicable to the Osages. It is at least clear that it cannot for no land was purchased for the Osages with the understanding that it would not be taxable.

The opinion is correct in assuming that the 1936 act must be construed with the earlier Osage acts but the reasoning is faulty when the attempt is made to construe them together. It is said by the opinion that prior to the passage of the 1936 act the lands purchased for the Osages were taxable and had been so made by Congress. It is then stated that the 1936 act and prior acts could operate together and without a repeal of the former acts.

They can operate together by construing the 1936 act as it was intended by Congress, that is, that it should apply to those landless Indians for whom homes had been purchased by the government.

PROPOSITION NO. II.

A Special Act on the same subject controls a general act, or the Special act must be construed as the exception to the general act even though the special act was first enacted.

"General and specific provisions in apparent contradiction, whether in the same or different statutes, *and without regard to priority of enactment*, may

subsist together, the specific qualifying and supplying exceptions to the general rule."

Townsend v. *Little*, 109 U. S. 504, 3 S. Ct. Rep. 357, 27 L. ed. 1012.

"Special and general statutes relating to the same subject should be treated as one law so far as this reasonably can be done."

British-American Co. v. *Board of Equalization*, 299 U. S. 159, 57 S. Ct. 132, 81 L. ed. 95.

The Osage Acts are Special Acts which apply especially to the Osages, while the Act of June 20, 1936, is a general act.

PROPOSITION NO. III.

In determining the purpose and meaning of the Act of June 20, 1936, the court should take into consideration the amendment of that Act by the Act of May 19, 1937.

In the opinion in *Tiger* v. *Western Investment Co.*, 221 U. S. 280, 55 L. ed. 738, 31 S. Ct. Rep. 578, it is said:

"When several acts of Congress are passed, touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject. *Cope* v. *Cope*, 137 U. S. 682, 34 L. ed. 832, 11 S. Ct. Rep. 222; *United States* v. *Freeman*, 3 How. 556, 11 L. ed. 548."

Congress by the passage of the amendment Act of May 19, 1937, clearly declared what its intention was at the time of the passage of the Act of June 20, 1936, and that declared intention was that the act should apply to

only 160 acres of land purchased for landless Indians for a home.

PROPOSITION NO. IV.

The Act of June 20, 1936, taken alone and by itself shows that there was no intention that it should apply to property purchased for Osage Indians from their restricted funds.

From the argument heretofore made it is clear that Congress was not legislating concerning the Osages when appropriating $25,000.00 to pay back taxes.

At that time the Osage Indians already owned hundreds of thousands of dollars worth of real estate which they knew and which the officials of the Department of the Interior knew was taxable.

It is, therefore, quite obvious from the wording of the act itself that neither Congress nor the Indian Bureau expected this act to apply to the real estate which had been purchased for Osage Indians from their restricted funds.

As has been herein pointed out it is equally as apparent that Congress was not legislating concerning the Osage Indians when it was providing for the payment of taxes: —"Where the Secretary of the Interior finds that such land was purchased with the understanding and belief on the part of said Indian that after the purchase it should be non-taxable".

It may be stated that section 2 of the act is more broad in its terms than section 1, and that section 2 should be construed alone and by itself, but the Supreme Court of

the United States has many times held that an act must be construed as a whole. See *McKee* v. *United States*, 164 U. S. 287, 17 S. Ct. Rep. 92, 41 L. ed. 437; *Red Bird* v. *United States*, 203 U. S. 76, 27 S. Ct. Rep. 29, 51 L. ed. 96; *Talbott* v. *Silver Bow County*, 139 U. S. 438, 11 S. Ct. Rep. 594, 35 L. ed. 210; *United States* v. *Boisdore*, 8 How. 112, 12 L. ed. 1009.

PROPOSITION NO. V.

It was not the intention of Congress that the Act of June 20, 1936, should apply to the Osage Indians or their property and it is the intention of Congress which must govern.

Extracts from Congressional records and Committee reports are set out in Appendix B, the emphasis therein being ours.

It is so well established that the intention of Congress governs that it would seem to be unnecessary to cite authorities to that effect, but we quote from a few in order to show the force of the rule and in order to present the related rules showing the policy of the courts to, where necessary, limit or extend the use of words in order to require them to fit the general purpose and intention of Congress:

> "Construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text, conclusions which are in the spirit though not within the letter of the text."
>
> *United States* v. *Farenholt*, 206 U. S. 226, 27 S. Ct. Rep. 629, 51 L. ed. 1036.

"The intention of Congress is an all important factor in the interpretation of statutes enacted by it."

United States v. *Stone & Downer Co.*, 274 U. S. 225, 47 S. Ct. Rep. 616, 71 L. ed. 1013.

"The Federal Supreme Court will restrain the wider and doubtful prohibitions of a statute so as to make them accord with the narrow and more reasonable conditions and thus harmonize the entire law."

United States ex rel. Atty. Gen. v. *Delaware & H. Co.*, 213 U. S. 366, 29 S. Ct. Rep. 527, 53 L. ed. 836.

"The operation of a statute may be restrained within narrower limits than its words import, where it is evident that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."

Brewer v. *Blougher*, 14 Pet. 178, 10 L. ed. 408.

"Additional words of qualification needed to harmonize a general and a prior special provision in the same statute should be added to the general provision, rather than to the special one."

Rodgers v. *United States*, 187 U. S. 83, 22 S. Ct. Rep. 582.

"A thing within the intention of the makers of a statute is as much within the statute as if it were within the letter."

United States v. *Babbit*, 1 Black. 55, 17 L. ed. 94.

"A thing which is within the intention of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers."

Northwestern Mut. L. Ins. Co. v. *Gridley*, 100 U. S. 614, 25 L. ed. 746.

"In construing a statute, the court is not always confined to a literal reading even though where the words are clear and unambiguous they will control, but may consider its object and purpose, the things with which it is dealing, and the condition of affairs which lead to its enactment, so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact."

American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 S. Ct. Rep. 72, 52 L. ed. 208.

It is also well established that the intention of Congress may be ascertained from the reports of Committees of Congress and from the statements of Committee Chairman or sponsors of the bill explaining its meaning. See *Duplex Printing Press Co., v. Deering*, 254 U. S. 443, 41 Sup. Ct. Rep. 172, 65 L. ed. 349.

PROPOSITION NO. VI.

If the purpose and intention of the Act of June 20, 1936, had been to make all the real estate purchased by or for the Osage Indians out of their restricted funds exempt from taxation the Act would not apply to the taxes for the year 1936.

The Circuit Court of Appeals of this Circuit has so ruled. It is our information that no one has challenged the correctness of that holding of the Circuit Court of Appeals upon this point. Therefore no space will be used in the presentation of it.

PROPOSITION NO. VII.

It is an invasion of State rights and in violation of the Constitution of the United States to attempt to exempt large quantities of real estate, which had heretofore been taxable, from taxation.

The briefing of this question is left to the parties to this suit.

It is suggested, however, that:

1. The established policy of Congress has been to gradually grant to the Indians the freedom, duties, and responsibilities of full unrestricted citizenship, and that the 1936 Act, if construed as contended for, is in contravention of that policy.

2. That there is a distinction between ownership of property by the government and its ownership by wards of the government and that, if the property is actually not an instrumentality of the government it is not made so by declaration of Congress.

This language is from the case of *United States* v. *Wright*, 53 Fed. (2d) 300:

> "(5) On the first question, therefore, we think there can be no doubt that Congress has the power to legislate for the protection of the Eastern Band of Cherokee Indians and for the regulation of the affairs of the band. It is clear, however, that not every act of Congress with relation to the band would come within the power. As heretofore stated, the members of the band, by separation from the original tribe, have become subject to the laws of the state of North Carolina; and clearly no act of Congress in their behalf would be valid which interfered with the exercise of the police power of the state. *In such a situation, a*

law to be sustained must have relation to the purpose for which the federal government exercises guardianship and protection over a people subject to the laws of one of the states; i. e., it must have reasonable relation to their economic welfare." (Emphasis ours).

CONCLUSION.

It is urged in conclusion that it seems clear that the Act of June 20, 1936, was not intended to apply to the investments of the Osage Indians, and may the hope be again expressed that no decision will be rendered herein, which would preclude the presentation of the questions herein raised in the suits now pending against Osage County, Oklahoma.

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March, 1943.

APPENDIX A.

The seventh section of the Osage Act of June 28, 1906, (34 St. L. 539) which is frequently referred to as the Osage Allotment Act, reads as follows:

"Seventh. That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, *which shall remain inalienable and non-taxable for a period of twenty-five years*, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs: Provided, *that upon the issuance of such certificate of competency the lands of such member (except his or her homestead), shall became subject to taxation*, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States: Provided, *that the surplus lands shall be non-taxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress*: And provided further, that nothing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years and the royalty to be paid to said tribe as hereinafter provided: And provided further, That the oil, gas, coal and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress."

Section 1 of the Osage Act of April 18, 1912 (37 St. L. 86) reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that until the inherited lands of the deceased members of the Osage Tribe of Indians shall be partitioned or sold *the Secretary of the Interior be, and he hereby is, authorized to pay the taxes on said land out of any money due and payable to the heirs* from the segregated decedent's funds in the Treasury of the United States."

Section 7 of the same act reads as follows:

"Sec. 7. That the lands allotted to members of the Osage Tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions of alienation; nor shall the lands or funds of Osage tribal members be subject to any claim against the same arising prior to grant of a certificate of competency. That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs: Provided, however, That inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid under order of the county court of Osage county, state of Oklahoma: *Provided further, That nothing herein shall be construed so as to exempt any such property from liability for taxes.*"

Section 1 of the Act of February 27, 1925 (43 St. L. 1008), authorizes the Secretary of the Interior to pay the Osage Indians less than their income and to conserve the balance and to invest the balance or remainder. This language is used:

"The Secretary of the Interior shall invest the remainder, *after paying the taxes of such members*, in United States bonds, Oklahoma State bonds, real estate, first mortgage real estate loans not to exceed 50 per centum of the appraised value of such real estate, and where the member is a resident of Oklahoma such investment shall be in loans on Oklahoma real estate, stock in Oklahoma building and loan associations, livestock, or deposit the same in banks in Oklahoma, or expend the same for the benefit of such member, such expenditures, investments, and deposits to be made under such restrictions, rules, and regulations as he may prescribe."

Section 3 of the Act of February 27, 1925, (43 St. L. 1008) reads as follows:

"Sec. 3. Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth shall not be subject to the lien of any debt, claim, or judgment, *except taxes*, or be subject to alienation, without the approval of the Secretary of the Interior."

By the Act of March 2, 1929, (45 St. 1478) the trust period was extended until the 8th day of April, 1959, and personal restrictions until January 1, 1959 by this provision:

"The lands, moneys, and other properties now or hereafter held in trust or under the supervision of the United States for the Osage Tribe of Indians, the members thereof, or their heirs and assigns, shall continue subject to such trust and supervision until January 1, 1959, unless otherwise provided by Act of Congress."

The same Act contains the following provision:

"Homestead allotments of Osage Indians not having a certificate of competency shall remain exempt from taxation while the title remains in the original allottee of one-half or more of Osage Indian blood and in his unallotted heirs or devisees of one-half or more of Osage Indian blood until January 1, 1959: *Provided, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres.*"

APPENDIX B.

The Congressional Record for the Senate for June 6, 1936, discloses that the following proceedings were had:

"Page 9322. RELIEF OF INDIAN LANDS FROM TAXATION.

"The Senate proceeded to consider the bill (H. R. 7764) to relieve restricted Indians whose lands have been taxed or have been lost by failure to pay taxes, and for other purposes.

"Mr. King: Mr. President, I should like to have an explanation of the bill.

"Mr. Thomas, of Oklahoma: Mr. President, this bill seeks to accomplish certain purposes, which I will explain. Formerly the Congress authorized the Secretary of the Interior *to buy* land for *landless Indians*. The Secretary proceeded to buy the lands and assigned the Indians to reside upon such lands. The recommendation or assertion was made to the Indians that the land would be theirs and they would have no taxes to pay. Some lands were taken from private ownership and assessing authorities proceeded to assess the land for taxes. The taxes were assessed and stand against the land.

"In some cases tax warrants have been issued and the Indians have been threatened with dispossession. The department believes that in order to keep faith with the Indians, the tax warrants and tax assessments should be paid and the title to the lands cleared. The bill authorizes the appropriation of money for that purpose.

"Section 2 provides that *the lands so secured* shall hereafter be non-taxable.

"The President pro tempore. The question is on the third reading and passage of the bill.

"The bill was ordered to a third reading, read the third time, and passed, as follows" (The Act of June 20, 1936, follows in the record).

When it was ascertained that the departmental officials sought to apply this act of June 20, 1936, to the Osage Indians there was introduced into Congress and passed an amendment to the Act and the amendment became a law on May 19, 1937, so that the Act of June 20, 1936, as it is construed by the department, was in force for one month and one day less than one year.

The Committee on Indian Affairs made a report on the amendment. Senator Thomas as Chairman of the Committee on Indian Affairs made that report, which is as follows:

"The Committee on Indian Affairs, to whom was referred the bill (S. 150) providing for the repeal of Section 2 of Public Law No. 716 of the Seventy-fourth Congress, being an act entitled 'An Act to relieve restricted Indians whose lands have been taxed, or have been lost by failure to pay taxes, and for other purposes' having considered the same, report thereon with a recommendation that it do pass with the following amendment:

"On page 1 add a new section at the end of the bill as follows:

"Sec. 2. All homesteads heretofore purchased out of the trust or restricted funds of individual Indians are hereby declared to be instrumentalities of the Federal Government and shall be non-taxable until otherwise directed by Congress: Provided, That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior; and provided further, That the Indian owner or owners shall select,

with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town or city property, not exceeding in cost $5,000.00, to be designated as a homestead.

"This proposed legislation is for the repeal of section 2 of the act of June 20, 1936, Public Law No. 716, Seventy-fourth Congress (41 Stat. L. 1542).

"The said act of June 20, 1936, (49 Stat. L. 1542) was designed to bring relief and reimbursement to Indians who by failure to pay taxes have lost or now are in danger of losing lands purchased for them under supervision, advice, and guidance of the Federal Government, which losses were not the fault of the Indians, *but were purchased with the understanding and belief on their part and induced by representations of the Government that the lands be non-taxable after purchase. It was intended that such lands would be redeemed* out of the fund of *$25,000* authorized to be appropriated under the provisions of said Act of June 20, 1936 (41 Stat. L. 1542).

"Since the passage of said act of June 20, 1936 (49 Stat. L. 1542) it was found the provisions of section 2 thereof would apply to lands and other property purchased by restricted Indian funds, which would exempt from taxation *vast quantities* of property, such as *business buildings*, farm lands which are not homesteads, etc.

"The Commissioner of Indian Affairs appeared before the committee and suggested the amendment herein proposed, which proposed amendment was adopted and herein recommended by your committee."

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In the Supreme Court of the United States

No. 556

OCTOBER TERM, 1942

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, a Municipal Corporation, ET AL.,
Petitioners,
VERSUS
EVELYN SEBER ET AL.,
Respondents.

Certiorari Granted January 11, 1943
Opinion Delivered April 19, 1943

PETITION FOR REHEARING

MAC Q. WILLIAMSON,
Attorney General of the State of Oklahoma;
HOUSTON E. HILL,
Assistant Attorney General;
NORMAN J. FUTOR,
Assistant Attorney General;
EVERETT S. COLLINS,
County Attorney,
Creek County, Oklahoma
Counsel for Petitioners.

May, 1943.

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Certiorari Granted January 11, 1943
Opinion Delivered April 19, 1943

PETITION FOR REHEARING

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States.

Petitioners respectfully submit that they have been aggrieved by an opinion of the Court rendered herein on the 19th day of April, 1943, in the respects hereinafter set forth, and pray for a rehearing of said matter.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

The opinion fails to recognize that, in the sphere of Indian affairs, the power of Congress to interfere with the operation of state law is limited to legislation on behalf of tribesmen living in "distinct [Indian] political communities having territorial boundaries," and on behalf of property within such "territorial boundaries" (Worcester v. Georgia, 6 Pet. 515, 561).

That is what the concept of "Indian Tribe" meant to John Marshall—that is what the concept of "Indian Tribe" meant to the framers of the Constitution. In other words, Article 1, Section 8 of the Constitution confers on Congress the power "to regulate commerce" with any Indian group constituting "a distinct community, occupying its own territory, with boundaries accurately described." A tribal status so defined cannot be a mere creature of legislative fiat. A tribal status of that character must result from a common mode of life, governed by tribal institutions, and contained within "boundaries accurately described." If tribal status could be arbitrarily fixed by Congress, then Congress could confer "tribal" status on any group of persons and proceed thereafter to override state law, under the commerce clause. This manifestly was not contemplated by the framers of the Constitution nor by those contemporaries of the framers who had occasion to construe the constitutional clause in question. All of this was overlooked in the opinion wherein the following statement was made at page 10:

"And although the Creek tribal rolls were closed on March 4, 1906, Congress has recognized that un-enrolled Creeks of the half blood or more are tribal Indians subject to federal control" (Citing 47 Stat. 777, 49 Stat. 1135, 49 Stat. 1967, 56 Stat. —).

If Congress attempted to legislate as to commerce which was actually "intrastate," this Court could not concern itself with the fact that Congress had declared that such commerce had "interstate" status. In the same way, this Court cannot concern itself with the fact that Congress has declared that certain individuals have "tribal" status. Just as the Court must strike down federal legislation affecting commerce which is not actually "interstate" (even though Congress has "found" that the commerce *was* "interstate"), so must the Court hold unconstitutional *this* legislation affecting commerce which is *not* actually with the Indian Tribes (even though Congress has "found" that individuals of the type in question had "tribal" status).

Why do we say that the legislation in the case at bar does not come within the constitutional authorization to regulate commerce with the Indian Tribes? Let us refer again to *Worcester* v. *Georgia*, *supra*. The legislation in question is not legislation on behalf of "a distinct community, occupying its own territory." This is legislation on behalf of scattered individuals, who do not live and have never lived as a part of any tribe, confined within "its own territory with boundaries accurately described." The individuals concerned have lived out among the white people, and constitute no organic part of an Indian Tribe in any meaningful sense.

The very land in question is not tribal "territory with boundaries accurately described." And, as the Court recognized, the individuals concerned are not even *enrolled* in any tribe.

When the courts have, in the past, sustained tax exemption of "allotted" lands, they were dealing with property originally tribal in character "with boundaries accurately described." And that is the type of congressional interference with state taxation which is authorized by the Constitution. *Rickert* v. *United States*, 188 U. S. 432 (cited at p. 8 of the opinion).

But the land involved here has no tribal associations and has always been subject to state taxation.

It is desirable, at this point, to quote at length from the opinion of Mr. Chief Justice Marshall in *Worcester* v. *Georgia*, *supra*:

> "From the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as *nations*, respect their rights, and manifest a firm purpose to afford that *protection which treaties STIPULATE*. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian *nations* as DISTINCT POLITICAL COMMUNITIES HAVING TERRITORIAL BOUNDARIES, within which their authority is *exclusive*, and having a right to *all the lands* WITHIN THOSE BOUNDARIES, which is not only acknowledged, but *guaranteed by the United States*'" (pp. 556, 557) (Emphasis supplied).
>
> "The treaties and laws of the United States contemplate the *Indian territory* as COMPLETELY SEPARATED from that of the *States*; and provide that all intercourse with them shall be carried on exclusively by

the government of the Union. Is this the rightful exercise of power, or is it usurpation?" (pp. 557, 558) (Emphasis supplied).

"... That instrument [Constitution] confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes ...

"The Indian nations had always been considered as DISTINCT, INDEPENDENT POLITICAL COMMUNITIES, retaining their original natural rights ... The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian *nations*, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well understood meaning. WE HAVE APPLIED THEM TO INDIANS, AS WE HAVE APPLIED THEM TO THE OTHER NATIONS OF THE EARTH. They are applied to all in the same sense" (pp. 559, 560) (Emphasis supplied).

"The Cherokee Nation, then, is a *distinct community*, occupying *its own territory*, with *boundaries accurately described*, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this *nation* is, by our Constitution and laws, vested in the government of the United States" (p. 561) (Emphasis supplied).

It is clear that the Indians in the case at bar cannot be brought within that category of Indians in whose behalf the federal government has constitutional authorization to over-

ride state law. The legislation in question does not treat these Indians as a "nation." It does not treat these Indians as being a part of "distinct political communities having territorial boundaries" which are "guaranteed by the United States." The legislation in question does not "contemplate the *Indian* territory as *completely separated* from that of the *States*"—quite the contrary. This Court cannot say as to the legislative proceedings in question: "We have applied them to Indians as we have applied them to the other nations of the earth." They are applied to all in the same sense."

At page 7 of the opinion, the following assertion is made:

"The Acts of 1936 and 1937 are constitutional."

But the discussion which follows the assertion lends no support whatsoever to the assertion; it is all devoted to proving something which is not at issue, viz., that Congress has constitutional authorization to interfere with state law on behalf of such an Indian Tribe as constitutes "a distinct community, occupying its own territory, with boundaries accurately described."

The opinion admits that such power to interfere with state law is to be found only in the commerce clause of the Constitution. And *Worcester* v. *Georgia, supra*, is cited. We have already demonstrated that *Worcester* v. *Georgia, supra*, makes it clear that the commerce clause sustains the holding reached there, but that it likewise defines the limits within

which the congressional power may operate. It should be clear that respondents herein are outside those limits.

There is nothing in the Constitution, express or implied, which permits or authorizes Congress to interfere with state law (or state taxation) when individual Indians, such as those in the case at bar, go out into the market and traffic in lands which have no tribal associations.

Let us now examine that part of the opinion at page 7 which follows the assertion of constitutionality:

> "... From almost the beginning the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized . . . The power is not expressly granted in so many words by the Constitution, except with respect to regulating commerce with the Indian tribes, but its existence cannot be doubted . . ."

Worcester v. *Georgia, supra*, is cited by the Court to support the above statement—and there is nothing wrong with the statement as to the existence of federal power, in so far as it refers to federal power to protect, against state interference, such an Indian Tribe (or Nation) as constitutes "a distinct community occupying its own territory, with boundaries accurately described." But *there is nothing in the Constitution, express or implied, which permits or authorizes Congress to interfere with state law (or state taxation) when individual Indians, such as those in the case at bar, go out into the market and traffic in lands which have no tribal associations.*

After the above quoted reference to the Constitution at page 7, the opinion engages in a discussion of the helpless-

ness of the Indians. Such a discussion is out of place in this case, because the state is not here attempting to interfere with any lands which are under the protection of *treaty* obligations. The lands in question form no part of any "territory with boundaries accurately described" which was set aside for some Indian Tribe by the United States. If the lands in question were of the latter category, then they would, of course, be immune from state interference, including taxation.

Extending from the lower part of page 7 over to page 8 of the opinion is a quotation from *United States* v. *Kagama*, 118 U. S. 375, 384-85. That case held that—under the constitutional power "to regulate commerce . . . with the Indian Tribes"—Congress could provide a system of federal criminal law for Indians on an *Indian Reservation* even though such Reservation was within a State. Of course, Congress had power—it was legislating on behalf of a "distinct political community having territorial boundaries"—it was dealing with "Indian territory . . . completely separated from that of the States"—it was dealing with "a distinct community, occupying its own territory, with boundaries accurately described." The Kagama case joins *Worcester* v. *Davis*, *supra*, in defining the limits within which the congressional power may operate. And, as stated above, it should be clear that respondents are outside those limits.

Also on page 8 we have a discussion on the protection of tribal lands which were distributed in severalty. We are cited to *Rickert* v. *United States*, 188 U. S. 432, which held

such lands immune from state taxation. Why were they immune from state taxation? (1) They were parceled out to enrolled members of the tribe (the Indians in the case at bar are un-enrolled). (2) The lands had never been subject to state taxation, being ancestral tribal lands (the lands in the case at bar were always subject to state taxation and had no tribal associations). (3) The Indians constituted a "distinct community, occupying its own territory, with boundaries accurately described" (not so in the case at bar).

At page 9, we are cited to *Shaw* v. *Oil Corp'n*, 276 U. S. 575, 580-581, and we are told that:

> "The clear implication of the Shaw case is that those acts are valid exercises of congressional power and we so hold."

With all due respect to the Court, we urge that no amount of judicial dicta, no matter how "clear" its "implication," can be substituted for constitutional authorization. It is true that the Shaw opinion took no cognizance of the fact that the Constitution contains no more than a grant to Congress of power to regulate commerce with the Indian Tribes; *i. e.*, power to interfere with state law on behalf of such an Indian Tribe as constitutes "a distinct community, occupying its own territory, with boundaries accurately described." But the fact that the Shaw opinion took no cognizance of the constitutional limitation affords no justification for a continuance of the practice. Furthermore, the reference made to such matters in the Shaw case was merely dictum.

We are further told, at page 9 of the opinion, that:

> "They [these acts] are appropriate means by which the federal government protects its guardianship, and prevents the impairment of a considered program undertaken in discharge of the obligations of that guardianship."

But no congressional acts can be "appropriate" for any purpose when they are not within the scope of the constitutional power given to Congress. The Constitution says nothing about any "guardianship" by virtue of which the Congress may deprive a state of a taxing power over lands which have never had any tribal associations.

We do not here assert that the federal government even needs any constitutional authorization for assuming a "guardianship" over any Indians, tribal or otherwise (That is a matter between the Indians and the federal government with which the states have no concern). But a guardianship founded on expediency rather than constitutional authorization must yield the same respect to the state law of taxation as any other guardianship. If some Indians are found incompetent to manage their property, that is not so strange. Many white people are found incompetent to manage their property and guardians are appointed for them. But the guardian of an incompetent is expected to see that state taxes are paid on the property of his ward, and the existence of the guardianship does not suffice to destroy the tax lien. If the United States feels that it has an obligation to these Indians—but there is really no constitutional authorization for interference with state taxation—that does not mean that the United States has no way of protecting the Indians. Just

let the United States pay the taxes in cash, as any other guardian would, and as the United States did do in section 1 of the 1936 Act.

Here is an observation to be made: Indian persons who live in "distinct [Indian] political communities having territorial boundaries" impose no burden on the State for road construction and maintenance, police protection, and other public services. Indians living in that fashion—who imposed no burden on the States—were the type of Indians who have been involved in the previous decisions interfering with state taxation. But the lands involved in the case at bar are scattered through the white man's community and must, of necessity, receive the benefit of road construction and maintenance, police protection, and other public services. If the federal government feels obliged to protect its "wards" when they go outside their "distinct political communities having territorial boundaries" and procure these services at the expense of the State, let the federal government pay for such services by footing the tax bill.

CONCLUSION

For more than one hundred and fifty years, there have been congressional enactments and judicial decisions affecting Indian property—all on the authority of the commerce clause of the Constitution. Many of the enactments and decisions interfered with the operation of state law—many of them interfered with state taxation. But all of them had this in common: They dealt with property within "boundaries

accurately described." They "contemplated the Indian property as completely separated from that of the States." They dealt with the Indians as being a part of "distinct political communities having territorial boundaries."

In all of this legal business affecting Indians, no attempt was ever made to interfere with state law as it affected persons or property, *except* on behalf of Indian persons who were actually bonafide tribesmen living in "distinct [Indian] political communities having territorial boundaries," and on behalf of property within such "territorial boundaries."

Now, *for the very first time* (in these Acts of 1936 and 1937), an attempt is made to interfere with state taxation on behalf of Indian persons who are *not* bonafide tribesmen and who are *not* living in "distinct [Indian] political communities having territorial boundaries" and whose property is *not* within such "territorial boundaries."

It is this fact which makes it absolutely necessary to go back to the commerce clause of the Constitution. For all previous congressional enactments and judicial decisions, the commerce clause has been broad enough to sustain the interference with the state law. Why? Because, as above stated, there was never any question as to the tribal character of the persons and the property.

All of this means, of course, that previous judicial decisions afford no guide to the question involved here. Never before has this Court had occasion to consider the limits of the commerce clause from this standpoint.

If—as to certain commerce which was actually intrastate—Congress should pass legislation which resulted in interference with state taxation of such commerce, we could appeal to this Court to hold such legislation unconstitutional and free the state taxing power of such restraint. And such legislation would be held unconstitutional even though Congress had found that the commerce in question was interstate, and even though the legislation had been passed in pursuance of a beneficent purpose.

Now Congress has passed certain legislation under the commerce clause which results in interference with state taxation. The legislation is not, strictly speaking, a regulation of commerce with an Indian Tribe. However, a liberal interpretation has often obtained, *i. e.*, legislation has been sustained merely on the ground that it was enacted on behalf of Indian persons who lived in "distinct [Indian] political communities having territorial boundaries" and whose property was within such "territorial boundaries." But the 1936 and 1937 Acts do not even come within this liberal view, let alone the constitutional language: "to regulate commerce . . . with the Indian Tribes." So the fact that the persons seeking tax exemption here purport to be tribal members on the basis of congressional fiat, is really immaterial. In no event could it be said that such persons live in "distinct [Indian] political communities having territorial boundaries" or that their property was within such "territorial boundaries." Therefore, this legislation should be declared unconstitutional, even though Congress may have said, or implied, that such

legislation regulates commerce with the Indian Tribes, and even though the legislation was passed in pursuance of a beneficent purpose.

We realize that a petition for rehearing is often accorded scant attention. But we have earnestly endeavored to avoid, in this brief, a mere repetition of previous briefs filed in the case. We hope and believe that our analysis of the opinion of April 19 will be of service to the Court. We pray a rehearing in this matter.

Respectfully submitted,

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May, 1943.

SUPREME COURT OF THE UNITED STATES.

No. 556.—October Term, 1942.

Board of County Commissioners of the County of Creek, State of Oklahoma, a municipal corporation, et al., petitioners,
vs.
Evelyn Seber, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[April 19, 1943.]

Mr. Justice Murphy delivered the opinion of the Court.

This petition for certiorari presents the questions whether certain lands held by respondent Indians, subject to restrictions against alienation and encumbrance without the approval of the Secretary of the Interior, were exempt from Oklahoma real estate taxes for the year 1937 by virtue of the Act of June 20, 1936, 49 Stat. 1542,[1] whether a portion of those lands were exempt for subsequent years by virtue of the Act of 1936 as amended by the Act of May 10, 1937, 50 Stat. 188,[2] and whether the Acts of 1936 and 1937, so applied, are constitutional.

The facts are agreed. Prior to 1931 the Secretary of the Interior purchased three tracts of land, two rural and one urban, in Creek County, Oklahoma, for Wosey John Deere, an enrolled, full-blood member of the Creek Tribe of Indians. The purchase price was paid out of restricted royalties from an oil and gas lease of her restricted allotted land. She was given title subject

[1] Section 2 of this Act provides:
"All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress."

[2] The 1937 Act amended § 2 of the 1936 Act to read as follows:
"All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress: *Provided*, That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior: *And provided further*, That the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town or city property, not exceeding in cost $5,000, to be designated as a homestead."

to a condition against alienation or encumbrance without approval of the Secretary prior to April 26, 1931.[3] Before that date, with the approval of the Secretary, she reserved a life estate and conveyed the fee to her children, full-blood but un-enrolled Creeks and respondents here, subject to a like condition against alienation or encumbrance without the approval of the Secretary with the exception that the restriction had no definite time limitation. On December 10, 1937, Wosey John Deere conveyed her life estate to respondents so that they became full owners subject to a restriction against alienation or encumbrance without the approval of the Secretary. Both conveyances were in consideration of love and affection. Thereafter, on December 16, 1937, respondents designated the two rural tracts, totalling eighty-seven and one-half acres, as a tax exempt homestead under the provisions of the Act of May 19, 1937, and the Secretary approved this designation on March 24, 1938.

Before the Act of June 20, 1936, the lands were subject to Oklahoma real estate taxes.[4] Thereafter all three tracts were continued on the tax rolls of Creek County, and respondents, to avoid the accumulation of penalties and interest and a sale of the lands for taxes, paid the taxes for the years 1936, 1937, 1938, and part of 1939. On July 26, 1940, they filed this action in federal district court for the recovery of the 1936 and 1937 taxes paid on all three tracts, for the recovery of the 1938 and 1939 taxes paid on the two rural tracts designated as homestead lands, and for a declaration that the homestead lands were tax exempt. The district court gave judgment as prayed. 38 F. Supp. 731. The Circuit Court of Appeals affirmed for the most part but reversed with respect to the 1936 taxes on the ground that liability for them became fixed on the assessment date, January 1, 1936, before the enactment of the Act of June 20, 1936.

[3] In Sunderland v. United States, 266 U. S. 226, it was held that the Secretary of the Interior had power to impose such a restriction against alienation or encumbrance with respect to lands purchased for Indians of the Five Civilized Tribes (of which the Creeks are one) with the proceeds from sales of their restricted allotted lands. We think it clear that he also has authority to impose such restrictions upon lands purchased with restricted funds from leases of restricted allotted lands (see Shaw v. Oil Corp'n., 276 U. S. 575, and United States v. Brown, 8 F. 2d 564 at 568), and to make those restrictions run with the lands in the hands of Indian grantees. Cf. Drummond v. United States, 34 F. 2d 755, 758-59; United States v. Goldfeder, 112 F. 2d 615.

[4] See Shaw v. Oil Corp'n., 276 U. S. 575.

Interest on the taxes paid was also disallowed. 130 F. 2d 663. The importance of the case in the administration of Indian affairs and its impact upon state finances caused us to grant the County's petition for certiorari. Respondents have not cross-petitioned for review of the adverse decision on the 1936 taxes and the allowance of interest so it is unnecessary to consider those questions.

We hold that the 1936 Act extended tax immunity to all three tracts for the year 1937, that thereafter the 1937 Act exempted the designated homestead lands, and that both Acts, so applied, are constitutional.

Section 2 of the 1936 Act conditions tax immunity upon two requirements: (1) "title" to the lands must be "held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior"; and, (2) the lands must have been "heretofore purchased out of trust or restricted funds of said Indian". Both requirements are met here with respect to all three tracts. These lands were purchased from the restricted royalties received from an oil and gas lease of the restricted allotted lands of Wosey John Deere, and, on the assessment day, January 1, 1937,[5], she held title to a freehold life estate in all the parcels, subject to restrictions against alienation and encumbrance which were validly imposed by the Secretary of the Interior.[6]

Petitioners advance two arguments against the applicability of the 1936 Act. First they contend from remarks made by the sponsor of the 1936 Act in the Senate[7] that the Act applied only

[5] Under Oklahoma law the taxable status of property in Oklahoma is fixed as of the assessment date, January 1, in each year although taxes are levied as of July 1. See Board of Commissioners v. Central Baptist Church, 136 Okla. 99; In re Sinclair Prairie Oil Co., 175 Okla 289; In re Champlin Refining Co., 186 Okla. 625. For the purposes of this case we assume without deciding that the status of the property on the assessment date is determinative.

[6] See Note 3, *ante*.

[7] Senator Thomas said in part: "Formerly the Congress authorized the Secretary of the Interior to buy land for landless Indians. The Secretary proceeded to buy the lands and assigned the Indians to reside upon such lands. The recommendation or assertion was made to the Indians that the land would be theirs and they would have no taxes to pay. . . . In some cases tax warrants have been issued and the Indians have been threatened with dispossession. The Department believes that, in order to keep faith with the Indians, the tax warrants and tax assessments should be paid and the title to the lands cleared. The bill authorizes the appropriation of money for that purpose.

Section 2 provides that the lands so secured shall hereafter be nontaxable." 80 Cong. Rec. 9159.

to lands purchased for landless Indians, and thus did not extend to lands purchased from the restricted funds of Wosey John Deere, who held allotted land. We do not read those remarks as limiting the scope of the 1936 Act to landless Indians; they do not deal in terms of exclusiveness. But if they are to be interpreted as petitioners contend, we do not accept them as definitive because they are opposed to the clear words of the Act, the reasons for its enactment,[8] its contemporary administrative interpretation,[9] and its subsequent Congressional history.[10] Secondly petitioners assert that the exemption of the 1936 Act was personal and extended only to lands the title to which was held by the Indian whose restricted funds were used to purchase the lands. This position finds some support in the language of the Act, referring to "lands the title to which is held by an Indian . . . , purchased out of trust or restricted funds of said Indian", but it is unnecessary to determine whether the purpose of Congress was such that the Act should be more broadly construed than its technical terms might indicate. For, even assuming *arguendo* that petitioners are correct in saying that the 1936 Act afforded only a personal exemption, Wosey John Deere whose restricted funds purchased the three tracts, held a restricted life estate in each tract on January 1, 1937, the assessment date. As the life

[8] The Meriam Report to the Secretary of the Interior on the Problem of Indian Administration (Brookings Institute, 1928), pp. 795-98, pointed out that allotments were often unsuitable for homes, that other lands had to be purchased, and that while restricted allotted lands and the trust proceeds thereof had been held immune from state taxation, the tax status of property purchased with trust funds from sale or lease of allotted lands was in doubt. Legislation conferring tax exemption was recommended to protect the Indians against inability to pay or their insufficient sense of public responsibility, and to keep faith since officials of the federal government had expressly or impliedly represented that lands so purchased were tax exempt. The House and Senate reports show that this was the problem at which the 1936 Act was aimed. H. Rep. 2398, S. Rep. 2168, 74th Cong., 2d Sess. See also Cohen, Handbook of Federal Indian Law (1942), pp. 260-61.

[9] The Acting Attorney General and the Solicitor of the Department of the Interior both ruled that the 1936 Act applied to lands purchased from the restricted funds of individual Osage Indians who were not landless. 38 Op. A. G. 577; 56 I. D. 48.

[10] In reporting a bill to repeal the broad provision of § 2 of the 1936 Act the House Committee on Indian Affairs said: "It will be observed from the language of section 2, . . . that it applies to *all* lands purchased by restricted Indian funds and the Attorney General so held." H. Rep. 562, 75th Cong., 1st Sess. (emphasis supplied). The Senate substituted for the repealer an amendment limiting § 2 to homestead lands, which became the 1937 Act, but the Senate committee report also makes it clear that the 1936 Act covered all restricted Indian lands purchased out of restricted funds. S. Rep. 332, 75th Cong., 1st Sess.

tenant she was obligated to pay the taxes under Oklahoma law. 60 Okla. Stat. Ann. § 69; *Helm* v. *Belvin*, 107 Okla. 214; *Riley* v. *Collier*, 111 Okla. 130; *Waldon* v. *Baker*, 184 Okla. 492, 495. Since the 1936 Act was concerned with a tax exemption, the proper test of whether an Indian purchaser had "title" within the meaning of the Act must be whether he had retained such a property interest that, but for the Act, he would be subjected to the tax. Here Wosey John Deere retained such a title, and the three tracts were clearly within the 1936 Act even accepting petitioners' construction.

Likewise, the two rural parcels comply with the description contained in the 1937 Act which provides in part: "All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians . . . shall be non-taxable until otherwise directed by Congress: *Provided*, That the title to such homesteads shall be held subject to restrictions . . ." Those parcels were purchased from the restricted funds of an individual Indian, Wosey John Deere, respondents hold them subject to valid restrictions,[11] and they were properly designated by respondents as homestead lands on December 16, 1937, prior to the 1938 assessment date.[12] In view of the legislative history of the 1937 Act, summarized in note 10 *supra*, petitioners' argument that the 1937 Act applies only to lands purchased for landless Indians must be rejected.

It has been suggested that the tax exemption granted by the 1937 Act is personal to the Indian whose restricted funds were used to purchase the land, or else that it extends to the land in the hands of restricted Creek Indian grantees only until 1956, consonantly with the statutes governing the tax status of restricted allotted lands of the Creeks.[13] The Act does not say, however, and there is not a word to suggest that upon transfer of the lands to Indian heirs or grantees, subject to restrictions, the exemption is either to terminate or else extend only until 1956. If Congress had intended either result, it could easily have expressed those

[11] See Note 3, *ante*.

[12] The Secretary did not approve the designation until March 24, 1938, but we think this approval related back to the date of designation.

[13] See Act of June 30, 1902, 32 Stat. 500, 503; Act of April 26, 1906, § 19, 34 Stat. 137, 144; Act of May 27, 1908, §§ 4, 9, 35 Stat. 312, 313, 315; Act of April 10, 1926, 44 Stat. 239; Act of May 10, 1928, 45 Stat. 495; Act of May 24, 1928, 45 Stat. 733; Act of March 2, 1931, 45 Stat. 1471; Act of June 20, 1932, 47 Stat. 474; Act of January 27, 1933, 47 Stat. 777.

purposes. It did neither but provided instead that the lands while restricted were to remain non-taxable until it directed otherwise. In the absence of explicit Congressional direction we do not think we should hold the exemption personal or attempt to derive an applicable principle from the complicated and admittedly ambiguous statutes governing the tax status of restricted allotted Creek lands. Respondents received the land, which they have designated as a homestead, subject to restrictions of indefinite duration which the Secretary of the Interior had authority to impose.[14] It seems only fair, as the clear words of the 1937 Act provide, that the tax exemption should follow the restrictions and continue so long as they do, unless Congress meanwhile provides to the contrary. Even if the 1937 Act were ambiguous, we think this interpretation should be taken. Cf. *United States v. Reily*, 290 U. S. 33, 39.

It is argued, however, that the 1936 Act created only a personal exemption, and the 1937 Act gave no more because it was an amendment to the 1936 Act intended solely to limit the unnecessarily broad exemption of that Act. It is true that this was the avowed purpose of the 1937 Act,[15] but it does not follow that the 1937 Act grants but a personal exemption or else allows the exemption only until 1956. While the question need not be decided, it is appropriate to notice that the purpose of the 1936 Act makes it at least doubtful whether that Act afforded only a personal exemption. Assuming, however, that it did, there is nothing to indicate that the 1937 Act, contrary to its terms, incorporated the same limitation. The applicable committee report sheds no light one way or another.[16] There is no inconsistency between the object of the 1937 Act to limit the sweeping exemption of all lands granted by the 1936 Act, to homestead lands, and a purpose to enlarge the exemption accorded to the relatively small amount of homestead lands so that it would apply to restricted homesteads passing to Indian heirs or grantees. The fact that extensive changes in language were made in the 1937 Act is persuasive, moreover, that a change in sense from the presumed personal exemption of the 1936 Act was intended. If the only object of the 1937 Act was to limit the application of the 1936

[14] See Note 3, *ante*.

[15] See H. Rep. 562, S. Rep. 332, 75th Cong., 1st Sess.

[16] S. Rep. 332, 75th Cong., 1st Sess.

Act (with its assumed personal exemption) to homesteads, that purpose could have been accomplished simply by substituting the word "homesteads" for the word "lands". We cannot accept the view that the substantial changes in language were only matters of style. Furthermore, it has not been suggested that respondents, as takers from the original purchaser, were incompetent to designate the lands as a homestead under the 1937 Act. If they could do that, as we and apparently the Secretary of the Interior think they could,[17] it would seem to follow that, having properly designated their homestead under the Act, they are entitled to the tax exemption afforded restricted homesteads by the Act until Congress otherwise directs.

The Acts of 1936 and 1937 are constitutional. From almost the beginning the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized. Cf. *Worcester* v. *Georgia*, 6 Pet. 515. This power is not expressly granted in so many words by the Constitution, except with respect to regulating commerce with the Indian tribes, but its existence cannot be doubted. In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. This was classically summarized in *United States* v. *Kagama*, 118 U. S. 375, 384-85:

"From their (the Indians') very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

. . . . . .

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, . . . It must exist in that government, because it never has existed anywhere else, because the

[17] The Secretary approved respondents' designation. See Note 12, *ante*.

theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

After 1871 Congress turned from regulating Indian affairs by treaties to regulation by agreement and legislation. The plenary character of this legislative power over various phases of Indian affairs has been recognized on many occasions.[18] One aspect of this legislative program commenced with the General Allotment Act of 1887, 24 Stat. 388, followed by various other allotment acts dealing with specific tribes,[19] whereby Congress embarked upon a policy of assimilating the Indians through dissolution of tribal governments and the compulsory individualization of Indian land.[20] To lessen the difficulty of the period of transition and to protect the allottees' interest in their lands, Congress, by the device of the trust patent or a restricted fee, denied them the power to alienate or encumber their lands for fixed periods of time, subject to extension—denials which were sustained as proper exercises of Congressional power. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 310-17; *Brader* v. *James*, 246 U. S. 88, 96; *Sunderland* v. *United States*, 266 U. S. 226, 233-34. The obligation and the power of the United States to protect and preserve those restricted allotted lands for the Indian owners has been recognized. *Heckman* v. *United States*, 224 U. S. 413, and they were held immune from state taxation as instrumentalities by which the United States provided for the welfare and education of its Indian wards. *Rickert* v. *United States*, 188 U. S. 432.[21] It has also been

[18] See United States v. Kagama, *supra*; Choctaw Nation v. United States, 119 U. S. 1, 27; Stephens v. Cherokee Nation, 174 U. S. 445, 486; Lone Wolf v. Hitchcock, 187 U. S. 553, 566-68; Tiger v. Western Investment Co., 221 U. S. 286, 310-17; United States v. Sandoval, 231 U. S. 28, 45-47; Brader v. James, 246 U. S. 88, 96; Sunderland v. United States, 266 U. S. 226, 233-34; United States v. Ramsey, 271 U. S. 467, 469, 471; United States v. McGowan, 302 U. S. 535, 538-39; Board of Comm'rs v. United States, 308 U. S. 343, 349.

[19] Wosey John Deere received her allotment under an agreement negotiated with the Creeks by the Dawes Commission and incorporated into the Act of March 1, 1901, 31 Stat. 861, as amended by the supplemental agreement of June 30, 1902, 32 Stat. 500. See also § 19 of the Act of April 26, 1906, 34 Stat. 137, 144; Act of May 27, 1908, 35 Stat. 312; and Act of May 10, 1928, 45 Stat. 495.

[20] Allotments in severalty were halted by the Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, and by the Oklahoma Welfare Act of June 26, 1936, 49 Stat. 1967. These and other recent statutes reflect a change in policy, the theory of which is that Indians can better meet the problems of modern life through corporate, group, or tribal action, rather than as assimilated individuals.

[21] The land involved in the Rickert case was a trust allotment, rather than a restricted fee. The power of Congress over both types of allotments, however, is the same. See United States v. Ramsey, 271 U. S. 467, 471.

held by the lower federal courts that proceeds from the sale or lease of restricted allotted lands are immune from state taxation. See *United States* v. *Thurston County*, 143 Fed. 287; *National Bank of Commerce* v. *Anderson*, 147 Fed. 87. When this Court came to consider the tax status of lands of the character here involved, that is, lands purchased for an Indian from the trust or restricted proceeds of his restricted allotted land, it said that, "In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process." Lands so purchased, however, were held to fall within that class of "instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks." *Shaw* v. *Oil Corp'n.*, 276 U. S. 575, 580-81.

As a result of the *Shaw* decision Congress spoke in the Act of 1936 and the amendment of 1937, which were intended to protect the Indians in their land purchases from restricted funds and to keep faith with them because of the implied or express representations that those lands were tax exempt.[22] The clear implication of the *Shaw* case is that those Acts are valid exercises of Congressional power and we so hold. They are appropriate means by which the federal government protects its guardianship and prevents the impairment of a considered program undertaken in discharge of the obligations of that guardianship. The fact that the Acts withdraw lands from the tax rolls and may possibly embarrass the finances of a state or one of its subdivisions is for the consideration of Congress, not the courts. Cf. *Fed. Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 104. Also, it is immaterial that respondents are citizens because it is settled that the grant of citizenship to the Indians is not inconsistent with their status as wards whose property is subject to the plenary control of the federal government. See *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 312-17; *Brader* v. *James*, 246 U. S. 88, 96. It rests with Congress to determine when the guardianship relation shall cease. *Tiger's* case, *supra*; *United States* v. *Ramsey*, 271 U. S. 467, 469; *United States* v. *McGowan*, 302 U. S. 535, 538. Thus

22 See H. Rep. 2398, S. Rep. 2168, 74th Cong., 2d Sess. See also the Meriam Report to the Secretary of the Interior on the Problem of Indian Administration (Brookings Institute, 1928), pp. 795-98.

far Congress has not terminated that relation with respect to the Creek Nation and its members. That Nation still exists,[23] and has recently been authorized to resume some of its former powers. Act of June 26, 1936, 49 Stat. 1967. And although the Creek tribal rolls were closed on March 4, 1906,[24] Congress has recognized that un-enrolled Creeks of the half blood or more are tribal Indians subject to federal control.[25] Respondents fall in this class.

We have considered the other contentions raised by petitioners and find them without merit. The judgment below is correct in the matters appealed from and is therefore

Affirmed.

Mr. Justice REED took no part in the consideration or decision of this case.

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[23] The Act of March 1, 1901, 31 Stat. 861, and the supplemental agreement of June 30, 1902, 32 Stat. 500, provided for the dissolution of the Creek Tribe on March 4, 1906, but this provision was revoked by the joint resolution of March 2, 1906, 34 Stat. 822, and § 28 of the Act of April 26, 1906, 34 Stat. 137, 148.

[24] Section 2 of the Act of April 26, 1906, 34 Stat. 137.

[25] See Act of January 27, 1933, 47 Stat. 777; Act of Feb. 11, 1936, 49 Stat. 1135; Act of June 26, 1936, 49 Stat. 1967; Act of December 24, 1942, c. 813, 56 Stat. —.

SUPREME COURT OF THE UNITED STATES.

No. 556.—October Term, 1942.

Board of County Commissioners of the County of Creek, State of Oklahoma, a municipal corporation, et al., petitioners, *vs.* Evelyn Seber, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[April 19, 1943.]

Mr. Justice Rutledge.

I concur in the result and also in the opinion except as it relates to the taxes for 1938 and thereafter, levied and collected under the 1937 Act. I agree that the exemption extended for these years to Wosey John Deere's grantees, but for different reasons and with the limitation, which I think should be stated, that under presently effective legislation the exemption extends only to 1956.

As I understand the ruling, the opinion grounds the exemption for grantees squarely on the 1937 Act, without reference to whether they were also exempt under the 1936 Act, a question not decided. With that I cannot agree. The later statute amended the earlier one. Both its terms and its legislative history[1] show it had only one purpose. That was to cut down the amount of land exempted. "All homesteads" took the place of "all lands." There were other changes in language, but they were matters of style, not of substance. There is not a word in the Act of 1937 itself or in the Committee reports to Congress to show that any other change was in mind. I find therefore no evidence of purpose to enlarge the protected class at the same time the amount of land exempted was being reduced. Nor is mere absence of language expressly limiting the exemption to a class defined in the Act a sufficient basis for implying an intent to enlarge the protected class. Nullifying the power of a state to tax land within its borders held by or for private individuals is too important and delicate a matter to hang on such an implication.

[1] See H. R. Rep. No. 562, 75th Cong., 1st Sess.; S. Rep. No. 332, 75th Cong., 1st Sess.

In my opinion therefore the sole purpose and effect of the 1937 Act was to reduce the quantity of land for which exemption could be claimed. Consequently, if grantees were within the benefit, it was because they were so by virtue of the 1936 Act.

A literal reading of that Act possibly would lead to the conclusion that grantees were excluded and the protection was personal to the Indian with whose funds the lands were purchased. But the language is not absolutely conclusive to this effect, and in my opinion the legislative history[2] shows that the purpose again was not to enlarge or restrict the classes to which the benefit applied, but rather was to bring within the scope of preexisting exemptions lands not covered by them. Any other view would create as to the lands covered by the 1936 Act, which were acquired with restricted funds, a different and a preferred exemption as compared with that applicable to originally allotted lands, from the sale of which in large part the funds were derived. No intent can be imputed to Congress to give the substituted lands preferential treatment as compared with original allotments. The language does not require this and nothing in the legislative history gives a basis for believing it was intended. There is no sufficient reason in either for thinking that Congress intended to create new classes of beneficiaries or new kinds of exemptions, whether in duration or otherwise. There was a preexisting and defined general policy in both respects, no problem of either sort was presented by the situation the Act was intended to cure, and the sole purpose, in my opinion, was to make sure the preexisting exemptions would extend to the lands specified in the Act. Accordingly, whether grantees were exempted and, if so, for how long is to be determined not by implication or construction from the terms of the 1936 Act alone, but by reference to the law as it existed in respect of grantees of original allottees prior to 1936.

There is no need to go back of 1928, except to say that, for our purposes, the effect of prior legislation was that grantees of original allottees were not within the existing tax exemptions,[3] which

[2] See H. R. Rep. No. 2398, 74th Cong., 2d Sess.; S. Rep. No. 2168, 74th Cong., 2d Sess. See also 80 Cong. Rec. 9159 and Meriam Report to the Secretary of the Interior on the Problem of Indian Administration (Brookings Institute, 1928) 795-8.

[3] *Cf.* Act of June 30, 1902, c. 1323, § 16, 32 Stat. 500, 503; Act of April 26, 1906, c. 1876, § 19, 34 Stat. 137, 144; Act of May 27, 1908, c. 199, §§ 4, 9, 35 Stat. 312, 313, 315; Act of April 10, 1926, § 115, 44 Stat. 239.

were for the most part to expire at the latest in 1931.[4] In some instances, restrictions extended to lands held by heirs of allottees, but for the limited period.[5] In 1928, Congress extended existing restrictions on some lands—both alloted and inherited—to 1956, but at the same time removed existing restrictions on others. 45 Stat. 495. The existing tax exemption was cut down in scope to one hundred sixty acres of each Indian's holding, but was also extended more clearly to cover the land in the hands of "any full blood Indian heir or devisee," though not beyond 1956. 45 Stat. 495, as amended by 45 Stat. 733-4.

In 1933, probably by reason of the discovery of oil on Indian lands, consequent sale or lease of original allotments under the direction of the Secretary of the Interior, and numerous suits by Indians claiming the proceeds free from his restrictive power, Congress enacted another statute, 47 Stat. 777, which made all Indian funds then in or later coming to the Secretary's hands restricted. It contained the following proviso, which is the last word, for our purposes, on exemption of Five Civilized Tribe Indian lands prior to 1936:

Provided, That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such land shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956. . . . Provided further, That such restricted and tax-exempt land held by anyone, acquired as herein provided, shall not exceed one hundred and sixty acres.

In a number of respects the meaning of the provision is unclear. But, without attempt to clarify them, the general purpose seems to have been to exempt lands belonging to members of the Five Civilized Tribes during their lives, but not beyond 1956 and not exceeding 160 acres, if "acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for such restricted Indians." The proviso is awkwardly drawn, and some of the language could be taken to limit the exemption to the Indian with whose restricted funds the lands are acquired. But other language contradicts this and the legislative history shows it was contemplated the exemption would extend to heirs, devisees, donees

[4] 34 Stat. 144; 35 Stat. 315; 44 Stat. 239.

[5] See 35 Stat. 315; 44 Stat. 239.

and purchasers with restricted funds.[6] In short, as to the lands covered, Indian heirs, devisees, donees and grantees were within the protection. That the proviso covers directly the lands in question in the hands of Wosey John Deere's grantees may be doubted.[7] But, whether or not the statute applies specifically to this case, it shows the latest phase of Congressional policy, prior to 1936, as to the kind of exemption given to members of the Creek Nation and the persons entitled to its benefit.

In this background the 1936 Act was adopted. In my opinion it incorporated the previously existing exemption, as it related to duration and grantees, but extended it to "all lands" rather than merely the homestead. The 1937 Act returned to the homestead limit, but without change in other respects. In my view, therefore, and for these reasons, the grantees of Wosey John Deere were entitled to the benefit of the exemption, but unless it is extended further by Congress, only to 1956.

Mr. Justice ROBERTS joins in this opinion.

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[6] See H. R. Rep. No. 1015, 72d Cong., 1st Sess.; S. Rep. No. 873, 77d Cong., 1st Sess.; see also 75 Cong. Rec. 8163, 8170.

[7] They are homestead lands. They were bought with her restricted funds. She, if anyone, was a "restricted Indian," though that term is new in this Act and unclear. She acquired the lands by purchase. Her children took them by deed, whether by gift or by "purchase" is not material. They, too, were "restricted Indians," if she was. At any rate, they were full blood. All these things would fit the statute to the present case. On the other hand, the tax exemption in the proviso apparently extends only to newly acquired lands which prior to their acquisition were tax exempt and restricted. See 75 Cong. Rec. 8170. Nothing in the record indicates that the lands here involved were either tax exempt or restricted when Wosey John Deere purchased them. However, the precise significance of the apparent requirement that the lands shall have been tax exempt before they were acquired is obscured by the context of the proviso in a statute addressed primarily to the problem of restricting funds (in the hands of the Secretary) obtained largely from the sale of interests in restricted lands.